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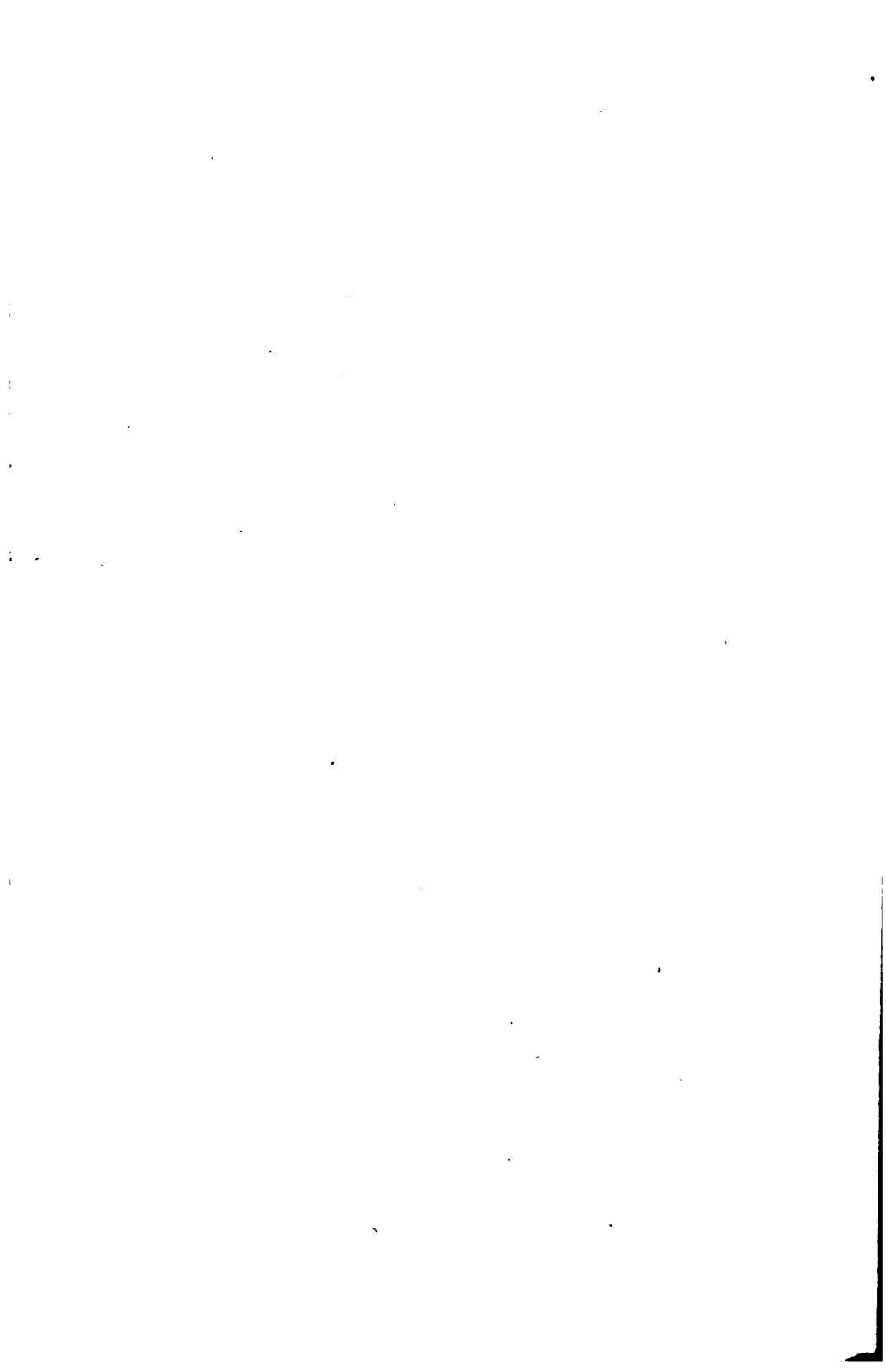
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CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 11630. Department Two. December 18, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Pacific
Power & Light Company, Appellant*, v. PUBLIC
SERVICE COMMISSION *et al.*, *Respondents*.¹

APPEAL—DISMISSAL—GROUNDS—WANT OF JURISDICTION. An appeal cannot be dismissed for want of jurisdiction in the lower court to entertain the case, that question being reviewable only on the hearing of the appeal.

Motion to dismiss an appeal from a judgment of the superior court for Yakima county, Preble, J., entered August 2, 1913. Denied.

Englehart & Rigg and *John A. Laing*, for appellant.

The Attorney General and *Stephen V. Carey*, *Assistant*, and *Guy O. Shumate*, for respondents.

PARKER, J.—This cause is before us upon the motion of the public service commission to dismiss the appeal taken by the Pacific Power & Light Company, the relator, from a decision of the superior court for Yakima county, affirming certain orders made by the public service commission touching certain things to be done by the relator as a public service corporation. Upon the making of the orders by the commission, following a hearing in Yakima county, the relator caused the proceedings had before the commission to be re-

¹Reported in 137 Pac. 302.

moved, by writ of review, to the superior court of that county. A hearing had therein upon the return of the writ resulted in a decision affirming the orders of the commission, from which decision the relator has appealed to this court.

The public service commission now moves this court to dismiss the appeal, insisting that the superior court for Yakima county did not have jurisdiction to review the orders of the public service commission; that its decision upon the reviewing of such orders is a nullity because of want of jurisdiction; and that, therefore, there is nothing to appeal from to this court.

Attention is called to our recent decision in *State ex rel. Russell v. Public Service Commission*, 75 Wash. 487, 135 Pac. 244, and Laws of 1911, p. 596, § 86 (3 Rem. & Bal. Code, § 8626-86), relating to review in the superior court of orders made by the public service commission. Upon this decision and this law, is rested respondents' contention that the superior court for Yakima county did not have jurisdiction, and that the superior court for Thurston county only had jurisdiction to review the orders made by the commission. This presents an interesting and important question; but we are of the opinion that it cannot be considered here upon a motion to dismiss the relators' appeal. Whether or not the superior court for Yakima county had jurisdiction is a question which is reviewable upon appeal. It seems clear to us that this court, by virtue of the appeal, has jurisdiction of the question of the jurisdiction of the superior court for Yakima county in this particular controversy. A motion to dismiss an appeal in this court may, of course, be rested upon the ground that this court has no jurisdiction; but we cannot agree with the view that the jurisdiction of this court is dependent upon the view it finally takes as to the jurisdiction of the superior court. The jurisdiction of a superior court upon appeal therefrom is always a pertinent question in this court. No decision has come to our notice holding that such a question is proper to be considered upon a motion to dismiss an appeal. Cases,

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Citations of Counsel.

probably by the hundreds, may be found where appellate courts have reversed decisions of lower courts because of want of jurisdiction in such courts; but it seems to us that the very deciding of such a question is the assuming of jurisdiction by the appellate court so deciding it. The fact that the question of the superior court's jurisdiction is involved, and we are called upon to decide that question, is sufficient, we think, to invoke the jurisdiction of this court.

The motion to dismiss is denied.

Crow, C. J., Mount, Fullerton, and Morris, JJ., concur.

[No. 11268. Department Two. December 19, 1913.]

*In re West Wheeler Street, Seattle.*¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT OF BENEFITS—SEPARATE MATTERS. Where a street one hundred and fifty feet wide was condemned, one-half of the width being for an elevated road to connect two bluffs and one-half for a road on the surface for the use of and exclusively benefiting lowlands in the valley between the bluffs, there are in fact two separate improvements, and it is error to assess part of the cost of the one against property benefited only by the other, especially where no more favorable contract or price was obtained for the land by reason of the fact that it was condemned as part of one improvement.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 15, 1913, confirming an assessment. Reversed.

G. E. de Steiguer, R. E. Thompson, Jr., Raymond D. Ogden, and Peters & Powell, for appellants, cited: *In re South Shilshole Place*, 61 Wash. 246, 112 Pac. 228; *Southwick v. Santa Barbara*, 158 Cal. 14, 109 Pac. 610; *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

James E. Bradford and *C. B. White*, for respondent, contended that mere conflict in the testimony is not ground for

¹Reported in 137 Pac. 303.

disturbing the findings in confirming the roll. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *In re Seattle*, 50 Wash. 402, 97 Pac. 444; *In re Pine Street*, 57 Wash. 178, 106 Pac. 755; *In re Twelfth Avenue*, 66 Wash. 97, 119 Pac. 5; *In re Fifth Avenue and Fifth Avenue South*, 66 Wash. 327, 119 Pac. 852. The two matters could all be embraced in a common scheme and it is immaterial that the subject was capable of subdivision. *In re Third, Fourth, and Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862; *Springfield v. Greene*, 120 Ill. 269, 11 N. E. 261; *Drexel v. Town of Lake*, 127 Ill. 54, 20 N. E. 38; *Village of Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327; *Haley v. Alton*, 152 Ill. 113, 38 N. E. 750; *Walker v. People ex rel. Kochersperger*, 170 Ill. 410, 48 N. E. 1010; *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067; *Wells v. Street Com'rs of Boston*, 187 Mass. 451, 73 N. E. 554; *Philadelphia & Reading Coal & Iron Co. v. Chicago*, 158 Ill. 9, 41 N. E. 1102; *Lincoln v. Board of Street Com'rs of Boston*, 176 Mass. 210, 57 N. E. 356; *Alden v. Springfield*, 121 Mass. 27; *Boyd v. Wilkinsburg Borough*, 183 Pa. St. 198, 38 Atl. 592; *Sears v. Street Com'rs of Boston*, 180 Mass. 274, 62 N. E. 397, 62 L. R. A. 144.

MOUNT, J.—This is an appeal from an order of the superior court of King county, approving a special assessment roll as prepared and filed by the eminent domain commission of the city of Seattle, to which objections have been filed by various property owners. The property owners have appealed.

It appears that, in the year 1911, the city of Seattle, by ordinance, authorized the condemnation of certain real property for the purpose of constructing certain overhead bridges and connecting what is commonly known as Magnolia Bluff with Queen Anne Hill, in the city of Seattle. Magnolia Bluff is a head land, lying in the northwest part of the city of Seattle, immediately west of what is commonly known as Smith's Cove. This bluff rises abruptly to a maximum elevation of about three hundred feet. To the eastward from Magnolia

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Bluff, lies Queen Anne Hill which rises abruptly to a maximum height of about three hundred feet. Between these two hills is a valley, from a half to three-quarters of a mile wide. In this valley is Smith's Cove Waterway. Numerous railroads extend north and south lengthwise of this valley. Fifteenth avenue, west, runs in a northerly and southerly direction along the western slope of Queen Anne Hill. This is the only avenue for traffic between Magnolia Bluff and the lowlands lying between Magnolia Bluff and Queen Anne Hill to the business portion of the city of Seattle.

The object of this improvement was to build overhead roadways, extending from Fifteenth avenue, west, westward across the valley between Magnolia Bluff and Queen Anne Hill, so that the residents of Magnolia Bluff might reach the city of Seattle in a more direct and available route than theretofore existed. The roadway leading to Magnolia Bluff, or Twentieth avenue, west, and Thorndyke avenue, which is on the eastern slope of Magnolia Bluff, is proposed to be an overhead roadway from twenty to seventy feet high, extending from Fifteenth avenue, west, on Queen Anne Hill to Twentieth avenue, west, and Thorndyke avenue on Magnolia Bluff. As a part of the plan, it became necessary to condemn a roadway across the lowlands heretofore mentioned. This roadway is seventy-five feet in width. In order to accommodate the residents living in the lowlands, it was proposed to condemn a roadway from Fifteenth avenue, west, one hundred and fifty feet wide, down the side of the hill a distance of about two blocks, to Seventeenth avenue, west, lying in the lowlands. The roadways were thus condemned. Seventy-five feet of the roadway from Fifteenth avenue, west to Seventeenth avenue, west, was designed for the overhead roadway extending to Magnolia Bluff, while the northeasterly half of the roadway, seventy-five feet in width, was to be constructed upon the ground for the purpose of serving the people living in the valley or lowlands.

It is apparently conceded in the record that this strip of

roadway, one hundred and fifty feet wide from Fifteenth avenue, west, to Seventeenth avenue, west, was condemned at a cost of \$69,123; and that \$3,588.75 of this cost was assessed to the lowlands, while the balance thereof was assessed to the highlands lying upon Magnolia Bluff.

The evidence shows conclusively that the roadway seventy-five feet wide leading from Fifteenth avenue, west, to Seventeenth avenue, west, located in the lowlands, will be of no use or benefit to the property lying upon Magnolia Bluff or to the west of the waterway; and that the overhead roadway extending from Fifteenth avenue, west, northwesterly across the lowlands, will be of no possible use or benefit to the property lying in the lowlands. The testimony was all to this effect, and the trial court so found. But, by reason of the fact that the improvement was provided for by one ordinance, the trial court was of the opinion that the improvement was one unified improvement not capable of separation; and that, because the evidence showed that all of the property assessed within the whole district comprising Magnolia Bluff and the lowlands would receive the benefit for which it was assessed, the trial court approved the assessment roll.

It seems clear to us—in fact there is no dispute upon the record—that, while these improvements were provided for by one ordinance, they are, in fact, two separate and distinct improvements. There is nothing in common between the two. There is no common use, by the people living in the lowlands, of the overhead structure leading to the highlands. There is nothing common between the improvement of the way to the lowlands and the overhead way to the highlands, except the mere fact that these two streets, one seventy-five feet in width on an elevated roadway, and the other a street constructed upon the ground, of the same width, adjoin each other at their connection with Fifteenth avenue, west. Otherwise there is no connection between the improvements.

The testimony shows that the improvement of the street seventy-five feet in width leading from Fifteenth avenue, west,

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to Seventeenth avenue, west, in the lowlands, is of no benefit to the property of the highlands, any more than it is to any distant part of the city of Seattle. It is plain, therefore, that, while the two improvements were passed by one ordinance, they are, in fact, separate and independent of each other.

In the case of *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121, where this question was raised, we said:

"The question is put, 'Can it be said, for instance, that the lots on Tenth avenue in said assessment district are benefited by the paving and curbing and sidewalking of Fifth avenue' (a parallel avenue five blocks away)? If a correct decision rests upon this premise, we would feel bound to hold with appellants, but it is shown that, in the interest of economy, the city can, by creating a district including several streets, make more favorable contracts, and thus reduce the cost to the property owner; and that neither the cost nor benefit to a lot on Fifth avenue is considered when estimating the cost or benefit to a lot on Tenth avenue. By a system of book-keeping, the cost to each lot or parcel of land and of each street is kept separate, so that no injury comes to the property owner; but on the contrary there is, theoretically if not actually, a positive benefit."

But that cannot be said in this case, for here it is conceded that about \$30,000, being the cost of the roadway leading from Fifteenth avenue, west, to Seventeenth avenue, west, entirely for the benefit of the lowlands, is assessed to the highlands on Magnolia Bluff, which are not benefited in any way, either theoretically or otherwise. And it is not shown, nor is there any contention in the case, that a more favorable contract or price for the condemnation of this one hundred and fifty foot strip was made by reason of the fact that it was condemned as a part of the same improvement. We are clear, therefore, that it was the duty of the board of eminent domain commissioners to assess to the lands benefited thereby the cost of the roadway seventy-five feet in width from Fifteenth avenue, west, to Seventeenth avenue, west, leading to the lowlands, and not to assess such

cost, as was done in this case, to the lands concededly not benefited thereby.

The judgment of the lower court is therefore reversed, and the cause remanded with instruction to revise the assessment so that the cost of the street which is solely for the benefit of the lowlands shall be assessed thereto and deducted from the assessment upon the highlands and lands not benefited thereby.

Crow, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11345. Department One. December 19, 1913.]

FORTSON SHINGLE COMPANY, *Respondent*, v. DANIEL
SKAGLAND *et al.*, *Appellants*.¹

VENUE—CHANGE—BIAS OF JUDGE—TIME FOR APPLICATION. In an action for an injunction, an application for a change of judges, under 3 Rem. & Bal. Code, § 209-1, is too late, when not made until after a hearing upon a show cause order and the granting of a temporary injunction upon such hearing.

JUDGES—DISQUALIFICATION—STATUTES—TIME FOR CHALLENGE. Under Rem. & Bal. Code, § 209, disqualifying a judge who had "been counsel for either party in the action or proceeding" a trial judge is not disqualified from the fact that before going on the bench his law firm had represented one of the parties in other matters; especially where the challenge was not made until after the respondent had rested his case.

NAVIGABLE WATERS—STREAMS—NAVIGABILITY. A stream is navigable, where during freshets regularly recurring during certain months, there was sufficient water, in its natural state, to float shingle bolts and forest products without using the banks of the stream; and it is immaterial that it was necessary to remove wind-falls and artificial obstructions caused by logging the land to restore the stream to its natural state.

APPEAL—REVIEW—EXCEPTIONS. The insufficiency of the evidence cannot be assigned as error, in the absence of exceptions to the findings of fact.

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Opinion Per Gose, J.

Appeal from a judgment of the superior court for Snohomish county, W. P. Bell, J., entered December 31, 1912, upon findings in favor of the plaintiff, in an action for an injunction. Affirmed.

A. M. Wendall and *E. C. Dailey*, for appellants.

Coleman, Fogarty & Anderson, for respondent.

Gose, J.—This is an action to enjoin the defendants from interfering with the plaintiff in floating shingle bolts and other forest products in Segelson creek, a tributary of the Stillaguamish river. Segelson creek flows through land owned by the defendants. The complaint alleges that it is a floatable and navigable stream for shingle bolts and other forest products, and that the defendants had forbidden plaintiff to use the stream for floating its shingle bolts and other forest products in that part of the stream which flowed over their land. A decree was entered in harmony with the prayer of the bill. The defendants have appealed.

The appeal presents two questions: (1) A denial of two challenges to the qualification of the trial judge; and (2) Do the findings of fact support the decree?

When the case was called for trial, the appellants filed a motion and affidavit for a change of judges, in pursuance of Laws 1911, p. 617 (3 Rem. & Bal. Code, § 209-1 *et seq.*). Prior to this application, a show-cause order had been issued against the appellants. Thereafter a hearing was had upon the respondent's application for a temporary injunction. The appellants appeared and resisted the application. After the hearing and prior to the filing of the motion and affidavit in question, the court granted a temporary injunction. Upon this state of the record, the motion was not timely. *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40.

After the respondent had rested its case, appellants called the president of the respondent, who testified that the law firm of which Judge Bell, the trial judge, was a member, had represented the respondent in two lawsuits. He further

testified that Judge Bell had not represented the respondent professionally subsequent to his election as attorney general in 1908, about four years before the trial. There was no attempt to show that Judge Bell's services even remotely touched the subject-matter of the litigation, or that he or the firm of which he was a member had been under a general retainer. The case then proceeded. On the following day, counsel for the appellants formally challenged Judge Bell because he had formerly represented the respondent professionally. The trial judge, in denying the challenge, said that, had the challenge been made at or before the commencement of the trial upon that ground, he would have declined to try the case. He also said, that the public had an interest in the trial of lawsuits; that he had practiced law in Snohomish county for twenty-five years; and that, since going upon the bench, he had heard many cases where he or the firm of which he was formerly a member had represented some one of the parties to the action professionally prior to the time he entered upon the performance of his judicial duties. This ruling is assigned as error. Judge Bell had not "been counsel for either party in the action or proceeding;" hence, was not disqualified. Rem. & Bal. Code, § 209 (P. C. 81 § 111); 40 Cyc. 132. The challenge, while embarrassing to the judge, was utterly wanting in merit. The respondent had rested its case when the challenge was made. The judge very properly said that the public had an interest in the dispatch of litigation. The respondent, also, had a right to demand that the trial proceed, in the absence of some statutory disqualification of the judge. Orderly procedure, the rights of the respondent, and the public interest, alike demanded that the challenge be denied.

Upon the merits of the case, the court found:

"(5) That said Segelson creek is a floatable and navigable stream for shingle bolts and other forest products during freshets regularly recurring for a period of between three (3) and four (4) months in the spring and summer, and during a period of from two (2) to three (3) months during

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the fall of each year; that during said recurring freshets said Segelson creek for periods of several days together contains water varying from eighteen (18) inches deep to three (3) or four (4) feet; that said quantity of water is ample and sufficient to float shingle bolts and other forest products through said creek into the Stillaguamish river and that said shingle bolts and other forest products can be so floated in said Segelson creek to the Stillaguamish river without using the banks of said stream.

"(6) That all the timber has been logged off from said premises of defendants, and that when said premises were logged certain windfalls, brush, tree tops and some logs were left in said Segelson creek; that both the plaintiff and the defendant have removed said brush, logs and windfalls from said stream; that said stream would float shingle bolts before the removal of said brush, logs, windfalls and other forest debris from said stream, but the same could not be driven to the Stillaguamish river without the removal of said forest debris."

The findings support the decree. The test of the navigability of a stream is, Was it navigable in its natural state? If it was, neither accidental nor intentional obstructions which were not there in its natural state will impair or destroy its legal navigability. *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272; *State ex rel. United Tanners Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017; *Olson v. Merrill*, 42 Wis. 203; *Treat v. Lord*, 42 Me. 252, 66 Am. Dec. 298; 25 Cyc. 1566. The windfalls and other obstructions referred to in the findings created an artificial condition. The removal of these obstructions merely restored the stream to its natural state.

There is a further assignment that the findings and judgment are contrary "to the law and the evidence." No exceptions were taken to the findings of fact and this precludes a review of the evidence. *Berens v. Cox*, 70 Wash. 627, 127 Pac. 189.

The decree is affirmed.

Crow, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11394. Department One. December 19, 1913.]

MARY E. LAUTENSCHLAGER *et al.*, Appellants, v. THE
CITY OF SEATTLE *et al.*, Respondents.¹

MUNICIPAL CORPORATIONS—STREETS—DEFECTIVE SIDEWALKS—NEG-
LIGENCE OF CITY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION
FOR JURY. The negligence of a city in maintaining a temporary side-
walk six inches lower than the cement walk with which it con-
nected at a street intersection, is for the jury, where it appears that
the temporary walk had been so maintained for several months, that
the street lights were so placed as to cast a shadow upon the offset,
and the street was not closed to travel, and no warnings were posted;
since it was the duty of the city to close the street or take reason-
able precautions where it undertakes to improve a street.

SAME—STREETS—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE
—EVIDENCE—QUESTION FOR JURY. The contributory negligence of a
pedestrian in falling at night at a street intersection, or in failing
to take a safer way, is for the jury, where there was a drop of six
inches from a cement sidewalk to a temporary board walk, where
improvements were in progress, no warnings were posted, and the
street lights were so placed as to throw a shadow obscuring the
offset, and the walk on the other side of the street had obstructions
and red lights hung out; since a traveler may use any street that
is open for travel.

SAME—DEFECTS IN STREETS—LIABILITY OF CONTRACTOR—EVIDENCE
—SUFFICIENCY. A street contractor doing the cement work in a
street is not liable for an injury sustained by a pedestrian by rea-
son of an offset of six inches in a temporary board sidewalk at a
street intersection, where he had done no work in the sidewalk
area and it did not appear who had constructed the board walk.

Appeal from a judgment of the superior court for King
county, Smith, J., entered January 10, 1913, in favor of the
defendants notwithstanding the verdict of a jury rendered in
favor of the plaintiff, in an action for personal injuries sus-
tained in a fall upon a sidewalk. Reversed as to one defend-
ant; affirmed as to the other.

Willett & Olson, for appellants.

James E. Bradford, Howard M. Findley, John W. Roberts,
and Peters & Powell, for respondents.

¹Reported in 137 Pac. 323.

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GOSE, J.—This is an action to recover for personal injuries sustained by the plaintiff in consequence of the alleged negligence of the defendants.

The facts, in brief, are these: On the evening of the 28th day of February, 1912, the plaintiff, in attempting to step from the cement walk to a temporary sidewalk at the southeast corner of Fifth avenue and Cherry street, fell and was injured. Her testimony shows that a two-plank walk had been laid on the east side of Fifth avenue, in the sidewalk area from Cherry street south one block to James street. One of her witnesses said that it extended south two blocks to Jefferson street. There was a cement sidewalk on the south side of Cherry street which extended east at least one block. There was an abrupt drop of about six inches from the cement walk to the planks.

The plaintiff lived on Fifth avenue some distance north of Cherry street. On the evening in question, she left her home with a view to attending church at Fifth avenue and Jefferson street. She traveled south along a planked roadway, about eighteen feet in width, in the center of the avenue, to the south side of Cherry street, thence east over a single plank connecting the roadway with the cement walk at the southeast corner of Fifth avenue and Cherry street. She then started south, falling at the offset at the connection between the cement walk and the two planks. She testified that she had theretofore continued south on the planked way in the center of the street; that she had seen the plank way on the east side of Fifth avenue, but that she did not know of the existence of the offset. Her testimony shows that the street light was so situated that it cast a shadow over the offset. Her testimony also tends to show that the two-plank walk had been in common use by the public for two or three months preceding the date of her injury.

At and for a considerable period of time before the plaintiff sustained her injury, the city was engaged in paving Fifth avenue from Madison street south to Jefferson street.

The avenues run approximately north and south. The streets run approximately east and west. At the time of the accident, a cement walk had been laid on the west side of Fifth avenue. There was a barrier at Madison and Jefferson streets on the east side of Fifth avenue, to prevent travel over the unpaved portion of the street, but there was no barrier, signal light, or other warning, over any part of the sidewalk area except as hereafter noticed. The record shows that there were tar cookers, a steam roller, and other paving equipment at or upon the southwest corner of Fifth avenue and Cherry street, upon which red lanterns were placed in the nighttime. The cement walk on the west side of Fifth avenue between Cherry and James streets had a further obstruction caused by a slide. Some of the witnesses say that the earth from this slide occupied only a small part of the sidewalk area, leaving an opening of sufficient width to accommodate travel. The charge of negligence is two-fold; (a) the offset without a light or barrier to indicate its presence; and (b) that the street lights were so located as to throw a shadow on the offset. The jury returned a verdict in favor of the plaintiff. All the parties to the action filed motions for a new trial, and each of the defendants filed a motion for a judgment *non obstante verdicto*. The plaintiff's motion for a new trial was denied. The motion of the defendants for a judgment *non obstante* was granted, and a judgment was entered in their favor. From this judgment the plaintiff appeals.

Both respondents contend that the appellant was guilty of contributory negligence which, as a matter of law, precludes a recovery in her behalf. The respondent McLellan also contends that there is no evidence tending to show any negligence on his part.

We think the court erred in entering a judgment *non obstante* in favor of the city. Whether the appellant was guilty of contributory negligence is a question of mixed law and fact. There is abundant evidence in the record which

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justified the jury in finding that the public were traveling the two-plank way, where the appellant fell, with the knowledge and approval of the city. An offset of six inches at sidewalk connections is shown by the testimony to be unusual. Whether the offset was obscured in consequence of the location and strength of the street light, and whether the appellant was exercising reasonable care at the time she met her injury, were questions for the jury.

Interlocked with the latter question was another, viz., whether the walk on the opposite side of the street was a safer one, and whether a reasonably prudent person would have taken it rather than the one which the appellant chose to follow. These are but side lights to the principal question, i. e., Was the appellant exercising reasonable care in view of all the attending circumstances. The jury, upon competent testimony, resolved this question in her favor. Where the public use a street upon the invitation of the city, either express or clearly implied, the duty devolves upon the city to use reasonable care to keep it in a reasonably safe condition for travel. *Taake v. Seattle*, 16 Wash. 90, 47 Pac. 220; *Cady v. Seattle*, 42 Wash. 402, 85 Pac. 19. A traveler is not required to avoid a particular street because there is another and safer one that he may take. He has a right to travel upon any street which the city leaves open for travel. *Cady v. Seattle*, *supra*. Where a city undertakes to improve a street, it is required to use reasonable precautions to guard the public from injury, and in doing so may, if necessary, temporarily close the street to public travel. *Peterson v. Seattle*, 40 Wash. 33, 82 Pac. 140. It was incumbent upon the city to provide signals or warnings if the walk was in common use and dangerous, and it knew, or in the exercise of reasonable care ought to have known, its condition. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847. If the light was so placed as to throw a shadow over the offset, the questions of the negligence of the city and the contributory negligence of the appellant were for the jury.

Stone v. Seattle, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253; *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. 844.

The respondents have cited *Hunter v. Montesano*, 60 Wash. 489, 111 Pac. 571, Ann. Cas. 1912 B. 955, and *Shannon v. Tacoma*, 41 Wash. 220, 83 Pac. 186. In the *Hunter* case, the plaintiff was injured while crossing a street which he knew to be dangerous and closed to travel, upon a dark, rainy night. In the *Shannon* case, the rule was recognized that in most cases it is a question of mixed law and fact whether the injured party used care commensurate with the conditions surrounding him.

This brings us to the second question, viz., Is there any evidence tending to connect the respondent McLellan with the negligence charged? We find none. He had a contract with the city to do the concrete work. Other contractors had graded the avenue, including the sidewalk area. Preparatory to laying the sidewalks, the respondent was required to make a subsurface grade of about four inches. He had neither touched nor taken control of the sidewalk area where the appellant fell. He had worked at other places. The jury, in response to an interrogatory, answered that the evidence did not show who laid the plank walk where the appellant fell.

The appellant has in this court expressly waived her claim of error in the denial of her motion for a new trial.

The judgment is reversed as to the respondent the city of Seattle, and affirmed as to the respondent McLellan.

Crow, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

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[No. 11373. Department One. December 19, 1913.]

JOSEPH GEHLEN *et al.*, *Appellants*, v. MARY P. GEHLEN,
Respondent.¹

WILLS—REQUISITES—PRETERMITTED CHILDREN — NAMING CHILDREN AS A CLASS—STATUTES—CONSTRUCTION. A will devising all the testator's estate to his wife and declaring that he makes no provision for "my children" or "any child which may be hereafter born" for the reason that their mother will deal justly with them, sufficiently "names" the children to prevent intestacy as to them, under Rem. & Bal. Code, § 1326, providing that a testator shall be deemed to have died intestate as to any child or children not named or provided for in his will; since the purpose of the statute is merely to prevent pretermission, and it is sufficiently complied with by naming them as a class, when coupled with words showing that the class included not only children *in esse*, but children thereafter to be born.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered May 29, 1913, dismissing an action for partition, upon denying plaintiff's motion for judgment on the pleadings. Affirmed.

John H. McDaniels, for appellants.

J. N. Streff, for respondent.

ELLIS, J.—This is an action for partition of real estate, in which the plaintiffs claim title to an undivided one-half, as children and heirs at law of Nicholas W. Gehlen, deceased; and the defendant, who is the widow of the decedent, and mother of the plaintiffs, claims the full ownership as sole devisee under the will of the decedent. Nicholas W. Gehlen died February 5, 1909, leaving a will, dated August 28, 1903, the material part of which is as follows:

"1. Subject to the payment of all my just debts and funeral expenses, I will, devise and bequeath to my beloved wife, Mary P. Gehlen, all the estate of which I may die seized and possessed, both real and personal, absolutely, to do and dispose of as she may deem fit; and I make no provision for

¹Reported in 137 Pac. 312.

my children after my death, or any child which may hereafter be born, knowing that my said wife, who is their mother, will deal justly with them.

"2. I hereby appoint my said wife executrix of this my last will and testament, and exonerate her from giving bonds, and authorize her, without an order of court, to sell and dispose of such property as she may deem fit, and to execute conveyance thereof."

The youngest child, Walter Gehlen, was born in the year 1905, subsequent to the date of the will. The realty in question was the community property of the decedent and the defendant. The plaintiffs, each asserting title to an undivided one-twelfth of the property, prayed for partition. The defendant, denying any title in the plaintiffs, set out the will, and prayed that her title thereunder be quieted. The plaintiffs moved for judgment on the pleadings. That motion being denied, they declined to plead further. Judgment was entered, dismissing the complaint and quieting title in the defendant. The plaintiffs appeal.

The sole question presented by this appeal is this: Can the children of a testator be disinherited by naming them as a class, or must they be named specifically by each of their individual names, or by terms of individual identification? Our statute, Rem. & Bal. Code, § 1326 (P. C. 409 § 41), reads as follows:

"If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so far as he shall regard such child or children, or their descendants, not provided for, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part."

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The appellants contend that, under this statute, there can be no sufficient naming of children by designation as a class unless that designation be accompanied by some substantial provision for each of the class, and of which each can legally avail himself, and that, failing such provision, the will, to be valid, must tell off the children by actual name, or by words of individual identification. It is claimed that each of the following decisions of this court sustains that contention: *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598; *In re Barker's Estate*, 5 Wash. 390, 31 Pac. 976; *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360; *Purdy v. Davis*, 13 Wash. 164, 42 Pac. 520.

An examination of the first three of these cases, however, discloses the fact that in none of them was there any mention of the children of the testator, either by name as individuals, or by designation as a class. In *Bower v. Bower*, it is said of the will: "By the terms thereof all of the property of the testator was devised to his wife, and to her heirs, forever, and she was named as sole executrix." In *In re Barker's Estate*, it is said: "By the terms of said will the testator gave and bequeathed all her property to her well beloved husband, to the exclusion of every one else who may or might be entitled to the same, and to him and his heirs and assigns forever." In *Hill v. Hill*, it is said: "The deceased left a will in which all of his property was devised to the appellant, no mention being made therein of any of his children." Whatever was said, therefore, in either of the three cases first above mentioned, must be construed as applying to a will in which there was no mention whatever of the children. The language of these cases relied upon by the appellants is that found in *In re Barker's Estate*, as follows:

"This court has lately considered this question, and has come to the conclusion that under our statute (§ 1465, Gen. Stat.), there must be some substantial provision for the children of which they can legally avail themselves, or else there must be an actual naming of such children in the will, or the same will be ineffectual as against such children. See *Bower v. Bower*, ante p. 225."

This language is not adopted in *Hill v. Hill*, though the decision is cited with approval. The language, however, is quoted in the still later case of *Purdy v. Davis, supra*, with apparent approval. While the language quoted is broad enough to sustain the appellants' contention in the case before us, it was, as we have seen, unnecessarily broad as applied to the language of the wills under consideration in the first three cases mentioned. An examination of the decision in *Purdy v. Davis*, also, shows that the language quoted was unnecessarily broad as applied to the language of the will there under consideration. In that case, the testatrix devised and bequeathed all of her property to her husband, subject to the following proviso:

"If the said Percival A. Purdy (appellant) should marry again after my demise all my property, both real and personal, is to belong to any one or more children that *may be* born to me before my demise."

It is manifest that this proviso makes no mention of children by name, nor of children as a class, but the class mentioned was only future-born children, which would not include the child already born, who, as there held, was not disinherited by the language used. That holding was, in any view of the statute, clearly correct, since that child was not mentioned either by name or by inclusion in any class. Matter unnecessary to a decision should never be held to establish a rule as *stare decisis*.

As pointed out in *Bower v. Bower, supra*, the purpose of this and similar statutes is not to declare as a policy of law that a testator shall not disinherit any of his children, nor to compel him to make some provision, whether substantial or otherwise, for any of them. Its purpose was merely to provide against any child being disinherited through inadvertence of the testator when making his will. Any construction of the statute which would have the necessary effect of compelling such a provision for any possible child would seem to be unwarranted as broader than the purpose of the

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statute, and should not be adopted unless the real purpose of the statute, namely, to prevent pretermisison of any child, can only be accomplished by such a construction. The construction contended for and which would be sustained by the language above quoted from *In re Barker's Estate*, had that language been necessary to the decision in that case, would lead to the very result which we have pointed out. It would compel the testator to either make some substantial provision for any child born after the will was made, or pronounce him intestate as to such child. In the nature of the case, he could not name by name an after-born child. He could, of course, describe it as an after-born child, but that would only be a naming by class, just as the designation of living children as "my children" would be a naming by class. If, therefore, it be held that the designation of an after-born child merely in those terms is sufficient to disinherit that child where no provision is made for such a child, which is the only alternative to a compulsory provision for such child, then, with equal reason, the designation of living children by the terms "my children" must be held a sufficient naming for disinheritance when coupled with language showing that intention. Since the purpose of the statute was merely to prevent pretermisison, and not to compel a testamentary provision for any child, we are forced to the conclusion that the mention of the children of the testator as a class, when coupled with words sufficient to show that the class then in the testator's mind, included not only all children *in esse* but children thereafter to be born, is a sufficient naming of the children for the purpose of disinheritance within the meaning of the statute. To adopt the contrary view would force us back to what Blackstone characterizes as "that groundless vulgar error, of the necessity of leaving the heir a shilling, or some other express legacy, in order to disinherit him effectually." 1 Cooley's Blackstone (4th ed.), p. 829.

The statutes of Missouri and Oregon are, in all material particulars, identical with our own. *Hill v. Hill*, *supra*,

Boman v. Boman, 49 Fed. 329. The supreme court of Oregon, in applying this statute, has held that the provisions of a will which, by reference to another will and adopting its terms, devised and bequeathed "all that may remain of my real and personal property to each of my living children and the children of my deceased daughter alike, to be divided as a majority of them shall say, by sale or otherwise," was a sufficient naming of the children to meet the statute. *Gerrish v. Gerrish*, 8 Ore. 351, 34 Am. Rep. 585. In a Missouri case the will involved provided:

"Also, I give and bequeath to my beloved wife, Bridget, the sole and entire possession and disposal and management of all my real and personal estate, also the sole and entire management and education of my children; and that she shall have the management, distribution and disposal of everything as completely, according to law, as I myself now have, during her widowhood. But in case she should change her mind and marry, my will is that the estate in her possession at the time shall be disposed of according to law among my surviving heirs."

The children were not otherwise mentioned in the will. The widow never married. A daughter brought an action to recover a part of the estate, claiming intestacy as to her. The court said:

"It is plain that she must have been in his mind. There are two allusions by the testator to his children; one in giving to his widow their management and education, and one in giving a remainder to his heirs, contingent upon her marriage. They were all remembered, or were all forgotten; and while he remembered them collectively, can it be said that he had forgotten them all individually? The object of the statute was to guard the testator against the effect of a mistake in providing for some of his children to the exclusion of others, through forgetfulness of their existence, or in otherwise disposing of his property in such forgetfulness, and the failure to allude to them is made evidence that they were so forgotten. In speaking of his children or heirs, had the testator named some of them, with no allusion to the plaintiff, we might then assume that she was forgotten; but where all were remembered

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collectively and equally provided for, with nothing to indicate that one was more in his memory than another, we must assume that each one was remembered and provided for." *McCourtney v. Mathes*, 47 Mo. 532.

The same court, construing a will devising property to the testator's wife, Mary C., for her life, with remainder to her children begotten by him, after quoting the will, said:

"The children of the testator by his wife Mary C., though not expressly mentioned, were named and provided for, within the meaning of this section, for the naming of children as a class, without further description, includes all who answer that description at the time the will took effect." *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657.

And again, the same court, construing the same statute in another case, said:

"This provision of the statute has been several times before this court for judicial construction, and it may now be considered as settled that the object of it is to produce an intestacy only when the child or the descendant of such child is unknown or forgotten, and thus unintentionally omitted; and the presumption that the omission is unintentional may be rebutted, when the tenor of the will or any part of it indicates that the child or grand-child was not forgotten." *Hockensmith v. Slusher*, 26 Mo. 237.

In *Beck v. Metz*, 25 Mo. 70, the testator devised and bequeathed all of his property to his wife "free from all claims and to the exclusion of all persons whatsoever." The fourth clause of the will provided:

"In every other respect I leave it entirely to the will and judgment of my said wife Catherine how and in what manner she thinks proper to dispose of the estate, as well with reference to our own child or children as with reference to the said Joseph Frederick Beck."

The court said:

"We think here the fourth clause mentions his child in sufficient manner to take this will without the 11th section of our statute of wills. (R. C. 1845.) The testator expressly mentions his child—as well with reference to our child.' They

had but one, the daughter. The wife had one by a former husband; even he is named. Now this mentioning his child and the giving the power to his wife to provide for this child by disposing of the estate according to her own judgment, must be considered within the spirit of our statute, as a naming or providing for his child."

After all, in applying this statute, as in other connections, the intention of the testator, when made clearly apparent on the face of the will, must prevail. For example: In *Guitar v. Gordon*, 17 Mo. 408, the testator named his daughter, who was then dead, but did not name her children. The provision for the daughter was held to have been intended as a gift for her children as a class. In *Hockensmith v. Slusher*, *supra*, a bequest was made to a son-in-law without naming his relation. It was held that, though his wife, the testator's daughter, was not named or provided for, she could not have been forgotten. See, also, *Woods v. Drake*, 135 Mo. 393, 37 S. W. 109.

The supreme court of Arkansas, under a statute somewhat similar to ours, has adopted the view contended for by the appellants here. *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563; *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373. We have been cited to no decisions of any other court so holding; and in view of the foregoing considerations, we cannot adopt that view.

It seems to us more consonant with the obvious purpose of the statute to hold that the naming of the children as a class, whether for the purpose of providing for them or for the purpose of disinheritance, when coupled with language conveying either intention, is such naming as to show that no child has been unintentionally overlooked, to avoid which contingency was the sole purpose of the statute. So far as any of our former decisions may be construed as holding the contrary, they are hereby overruled.

A will, in the absence of an expressed contrary intention, reads as of the date of the death of the testator; hence, what

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is said in this opinion has no application to posthumous children.

The judgment is affirmed.

CROW, C. J., MAIN, GOSE, and CHADWICK, JJ., concur.

[No. 11274. Department Two. December 19, 1913.]

MICHAEL LOY, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY *et al.*, *Appellants*.¹

APPEAL—REVIEW—VERDICTS. A verdict supported by substantial evidence, cannot be set aside on appeal because against the weight of the evidence, where the trial court refused to grant a new trial for insufficiency of the evidence.

APPEAL—RECORD—REMARKS OF COUNSEL—AFFIDAVITS—STATEMENT OF FACTS—NECESSITY. Error cannot be assigned on misconduct of counsel in argument to the jury, where the remarks were not taken down or reduced to writing and preserved in the record, but were shown only by affidavits on a motion for new trial, denied by counter affidavits, and not certified by the trial judge and made a part of the statement of facts.

TRIAL—SPECIAL INTERROGATORIES—DISCRETION. Whether interrogatories or special findings shall be submitted to a jury is a matter entirely within the discretion of the trial court.

NEW TRIAL—MISCONDUCT OF JURY—QUOTIENT VERDICT. The rendition of a "quotient" verdict, in an action for damages, is not ground for a new trial, where it does not appear that the jurors had agreed in advance to be bound by the quotient, each having merely stated the amount he deemed proper, and after the quotient was ascertained, the requisite number agreeing to accept the same.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. The damages in a personal injury case will not be held excessive where, if the plaintiff's evidence is believed, there was substantial evidence to sustain the amount of the verdict.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 25, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

¹Reported in 137 Pac. 446.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellants.

Forney & Ponder, for respondent.

MAIN, J.—The purpose of this action was to recover damages alleged to have been sustained by the plaintiff while being wrongfully ejected from a train of the defendant company. The cause was formerly before this court and the decision is reported in 68 Wash. 33, 122 Pac. 372. The facts will not here be stated except in so far as may be necessary to an understanding of the points to be considered.

The cause was tried before the court and a jury. A verdict was returned in favor of the plaintiff in the sum of \$6,640.92. Thereafter a motion for new trial was made, which was supported and opposed by affidavits. The motion was denied. Judgment was entered upon the verdict. The defendants have appealed.

The trial court submitted to the jury certain special interrogatories and refused to submit others. This ruling is complained of by the defendants as prejudicial.

Error is also sought to be predicated upon the argument of plaintiff's counsel to the jury. It is claimed that this argument brought before the jury matters which the record did not justify; and that it was highly inflammatory and improper. The objectionable remarks were not taken down by the court reporter. They are sought to be shown by an affidavit by the attorney for the defendants in support of the motion for new trial. This affidavit is met by a counter affidavit on the part of counsel for the plaintiff. Both affidavits are embodied in the statement of facts. The court, however, does not certify as to the remarks actually made. The affidavits are in conflict.

It appears that the jury arrived at their verdict in the following manner: Eleven jurors voted favorably to the plaintiff, each specifying the amount that he considered the plaintiff should receive; W. S. Blanchard, the foreman, voted

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that the plaintiff was entitled to nothing; thereupon the amounts were added together and divided by eleven, the result being \$6,640.92; thereupon the foreman stated: "All who are in favor of allowing the plaintiff the sum of \$6,640.92 will please say yes," or words to that effect, and all of the jurors except the foreman answered, "Yes." The jury then returned into court and were asked by the court if they had agreed upon a verdict. The foreman answered that they had. The verdict was then handed to the clerk and by him read and when asked by the court if that was their verdict, eleven jurors answered that it was. The defendants contend that the verdict was arrived at by lot or chance and, therefore, is not legal.

The questions presented are, first, is the verdict sustained by the evidence; second, misconduct of counsel; third, did the trial court err either in refusing or in submitting interrogatories to the jury; fourth, did the jury arrive at their verdict by lot or chance; and fifth, is the verdict excessive?

I. From the statement of facts it appears that the evidence on the part of the plaintiff and the defendants respectively is in conflict in many material particulars. If, however, there is substantial evidence to sustain the verdict, and the trial court upon motion has refused to set it aside, this court cannot grant a new trial because it may believe that the weight of the evidence was against the verdict. *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960; *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825; *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. 982; *Meador v. Northwestern Gas & Elec. Co.*, 55 Wash. 47, 103 Pac. 1107. In the case last cited it was said:

"The weight and sufficiency of evidence is for the consideration of the jury, and their verdict must be sustained in the appellate court when supported by substantial evidence, even though the court should be of the opinion that the weight of the evidence is against the verdict."

We are unable to find that there was not substantial evidence which would support the verdict and, therefore, under the rule stated, the verdict cannot now be disturbed.

II. On the question of the misconduct of counsel, it appears that the objectionable remarks were made in the presence of the court during the trial and might have been preserved, either by the stenographer, or upon request the court itself might have reduced them to writing. This, however, was not done. Upon motion for new trial, the defendant's counsel, by affidavit, set forth his version of the objectionable remarks. The plaintiff's counsel answered, denying and setting forth their version of the same. The trial judge has included both affidavits in the statement of facts but does not certify as to which, if either, correctly contains the substance of the language used. The language having been used in the presence of the court, it should have been certified to by the court and made a part of the statement of facts. To permit such facts to be presented by affidavits, gives rise to an unseemly contest between counsel upon matters that occurred in open court during the progress of the trial, and in the interest of orderly procedure, should not be tolerated. The objectionable language not having been preserved in the statement of facts, it cannot here be reviewed. In *Maryland Casualty Co. v. Seattle Electric Co.*, 75 Wash. 430, 134 Pac. 1097, it was said:

"It will be noted that some of the situations contemplated by the first three of the grounds for a new trial might arise upon matters occurring in open court during the progress of the trial, and the facts would then appear as a part of the record. In such a case, it is obvious that affidavits presenting such facts would be unnecessary and improper. Other situations contemplated by any one of these four subdivisions might arise out of matter not occurring in open court during the progress of the trial, and hence not appearing in the record. In such a case, evidence *aliunde* the record would be not only proper but necessary to any disclosure of the facts relied upon for a new trial."

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In *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. 606, 38 N. W. 520, the court, speaking upon this question, used this language:

"It is urged that the court below erred in not setting aside the verdict on account of the misconduct of plaintiff's counsel in presenting, in their arguments to the jury, inflammatory appeals and considerations, which should not have been urged, to influence the finding of the verdict. The substance and language of that part of counsel's argument to which the objection is made are set out in affidavits of defendant's counsel at the trial, and of others. Counter-affidavits were filed by counsel on the other side. This contest of affidavits between members of the profession is unseemly, and ought not to be tolerated. The law provides for perpetuating of record such matters by bills of exceptions by which the court below can show the facts, thus avoiding the necessity of resorting to affidavits. In view of the fact that usually a short-hand writer is in attendance upon the trial courts, his aid can be secured to take down the improper words of counsel; or the court, when objection is made thereto, can at the time reduce them to writing. In either case, they may be then or afterwards embodied in a bill of exceptions. This practice will involve no inconvenience, and will secure greater accuracy in preserving the objectionable words of counsel than can be attained by resorting to affidavits and counter-affidavits. We conclude that matters of this kind ought not to be made of record, and brought here, except upon bills of exceptions. We have heretofore reviewed objections based upon like conduct of counsel which were shown by affidavits, but no objections were made on the ground that the facts and language brought in question were not preserved and embodied in the records by bills of exceptions. We doubt not that, had the objections been made, we would have refused to review the question of misbehavior of counsel; but, at all events, we are now satisfied that correct practice requires that the court below shall certify the facts and language complained of as amounting to misbehavior on the part of counsel."

See, also, *Ford v. Easley*, 88 Iowa 603, 55 N. W. 336; *Everett v. Central Iowa R. Co.*, 73 Iowa 442, 35 N. W. 609; *Smith v. Wilson*, 36 Minn. 334, 31 N. W. 176, 1 Am. St. 669.

III. Whether interrogatories or special findings shall be submitted to the jury is a matter entirely within the discretion of the trial court. *Pencil v. Home Ins. Co.*, 3 Wash. 485, 28 Pac. 1031; *Bailey v. Tacoma Traction Co.*, 16 Wash. 48, 47 Pac. 241; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518; *Hart Lumber Co. v. Rucker*, 20 Wash. 383, 55 Pac. 320; *Matthews v. Spokane*, 50 Wash. 107, 96 Pac. 827. In the case last above cited it was said:

"The refusal of the court to submit special findings or a special verdict to the jury is next assigned as error. Such matters rest entirely within the discretion of the trial court, and its rulings are not subject to review on appeal."

IV. On the matter of the method by which the jury arrived at its verdict, it appears that eleven jurors voted favorable to the plaintiff, each specifying on a slip of paper the amount that he considered proper. Thereupon the amounts were added together and divided by eleven, the result being \$6,640.92. The foreman then stated: "All who are in favor of allowing the plaintiff the sum of \$6,640.92 will please say yes," or words to that effect, and all the jurors, except the foreman, answered "Yes." It does not appear that the jurors had agreed in advance to abide by the result. Where the jurors have not in advance agreed to abide by the result, and after a quotient has been arrived at by adding and dividing, the requisite number of jurors vote for a verdict in this sum, it is not subject to the objection that it was arrived at by lot or chance. *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647, 55 Am. St. 899; *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596; *Bell v. Butler*, 34 Wash. 131, 75 Pac. 130; *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. 841; *Wiles v. Northern Pac. R. Co.*, 66 Wash. 337, 119 Pac. 810. In *Wiles v. Northern Pac. R. Co.*, *supra*, it was said:

"There was no statement that the jurors had agreed in advance to abide by the result. Such agreement is the very essence of the misconduct charged. The burden of showing all the essential elements of the misconduct charged was upon the appellant. This court has often held that the taking of

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a quotient is not in itself misconduct, unless it appears that the jury had agreed in advance to be bound by it; even though the verdict returned be exactly or nearly the amount of the quotient."

V. It is claimed that, in any event, the verdict was excessive. If the evidence introduced on behalf of the plaintiff is to be believed, there was substantial evidence to sustain the amount of the verdict. On the other hand, if the facts are as claimed by the defendants, the verdict would seem to be excessive. This presents a question for the jury to determine. We are unable to say that passion or prejudice actuated the jury in arriving at its verdict.

The judgment will therefore be affirmed.

CROW, C. J., ELLIS, FULLERTON, and MORRIS, JJ., concur.

[Nos. 11531, 11360. Department One. December 19, 1913.]

THE STATE OF WASHINGTON, *on the Relation of Petrine DeSoucy et al., Plaintiff*, v. THE SUPERIOR COURT FOR SNOHOMISH COUNTY, *Respondent*.

THE STATE OF WASHINGTON, *on the Relation of John Lee et al., Plaintiff*, v. THE SUPERIOR COURT FOR SNOHOMISH COUNTY, *Respondent*.¹

EMINENT DOMAIN—DELEGATION OF POWER—TELEPHONE AND TELEGRAPH COMPANIES—STATUTES—CONSTRUCTION. Const., art. 12, § 19, and Rem. & Bal. Code, § 9304, requiring railroad companies to allow telegraph and telephone companies to maintain lines on the railroad right of way, and authorizing such companies to enter upon and appropriate portions of the right of way of a railroad company not interfering with the operation of the railroad, do not limit such companies to the use of railroad rights of way, when they were, by the same sections, given the right of eminent domain generally as to lands "actually necessary" for the line; hence they may condemn a strip of land privately owned, although it is adjacent to a railroad right of way.

¹Reported in 137 Pac. 311.

Certiorari to review judgments of the superior court for Snohomish county, Alston, J., entered June 19 and September 8, 1913, adjudging a public use and necessity in condemnation proceedings. Affirmed.

Vince H. Faben, for relators.

Otto B. Rupp, for respondent.

MAIN, J.—The purpose of these actions was to condemn a right of way through private property to be used for the erection of a telephone line.

The Pacific Telephone & Telegraph Company instituted proceedings for the purpose of condemning a strip of land ten feet wide through the lands of the relators John Lee and Lillian Lee, his wife, in the one case, and a strip of the same width through the lands of the relators Petrine DeSoucy and J. A. DeSoucy, her husband, in the other case. The strips sought to be condemned are, in each case, adjacent to the right-of-way of the Great Northern Railway Company. To the petitions filed by the telephone company in the superior court, demurrers were interposed upon the ground that the petitions did not state facts sufficient to constitute a cause of action. These demurrers were overruled. Thereafter hearings were had and adjudications of public use and necessity entered in both cases. And in each case it was ordered that a jury should be impaneled to assess the damages accruing to the owners and to all others interested in the lands described for the taking or injuriously affecting the same. For the purpose of reviewing these adjudications and orders, the causes were brought to this court by writs of certiorari, and were here heard together.

The relators claim that the telephone company has no right to condemn a right of way for a telephone line through private property alongside of a railroad right of way where there is space available within the right of way of the railroad sufficient for the use of the telephone company without substantial injury to the operation of either the railroad or

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the telephone system. In support of this contention, reliance is placed upon § 19 of art. 12 of the constitution of the state of Washington, and §§ 9302, 9304, and 9314 of Rem. & Bal. Code (P. C. 405 § 263; 171 § 297; 405 § 267).

Section 19 of article 12 of the constitution provides:

"Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights-of-way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section."

By this section of the constitution, telegraph and telephone companies are given the right to construct and maintain telegraph and telephone lines within this state; they are also given the privilege of constructing and maintaining telegraph lines upon the rights of way of railroad corporations organized or doing business in this state; and the right of eminent domain is extended to them. For the purpose of making effective this section of the constitution, the legislature enacted, among others, the sections of the statute above mentioned.

With respect to the exercise of the right of eminent domain by telegraph and telephone companies, the statutes, Rem. & Bal. Code, § 9300 (P. C. 405 § 259), provide:

"The right of eminent domain is hereby extended to all telegraph and telephone corporations and companies organized or doing business in the state."

The section of the statutes which requires railroad companies to allow telephone and telegraph companies to construct and maintain telegraph and telephone lines upon their rights of way (Rem. & Bal. Code, § 9302; P. C. 405 § 263) is in the following language:

"Every railroad operated in this state, and carrying freight and passengers for hire, or doing business in this state, is and shall be designated a 'postroad,' and the corporation or company owning the same shall allow telegraph and telephone companies to construct and maintain telegraph and telephone lines on and along the right of way of such railroad."

The extent of the right of telegraph and telephone companies to appropriate lands and property for the purpose of constructing telephone and telegraph lines is provided for by Rem. & Bal. Code, § 9304 (P. C. 171 § 297), which is as follows:

"Such telegraph or telephone company may appropriate so much land as may be actually necessary for its line of telegraph or telephone, with the right to enter upon lands immediately adjacent thereto, for the purpose of constructing, maintaining, and operating its line and making all necessary repair. Such telegraph or telephone company may also, for the purpose aforesaid, enter upon and appropriate such portion of the right of way of any railroad company as may be necessary for the construction, maintenance, and operation of its telegraph or telephone line: Provided, however, that such appropriation shall not obstruct such railroad or the travel thereupon, nor interfere with the operation of such railroad."

It will be noted that the section last quoted gives to telephone and telegraph companies the right to appropriate so much land as may be actually necessary for its telegraph or telephone lines. They are not limited to any particular lands nor to lands in any particular locality. In addition to the right to appropriate lands generally that are actually

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necessary for the construction and maintenance of their lines, they are given the additional privilege, if they shall not obstruct or interfere with the operation of railroads or the travel thereon, of entering upon and appropriating a portion of the right of way of any railroad company for such uses. It seems plain that it was not the intention, either by the constitution or the statutes, to limit telegraph and telephone companies to the use of rights of way of railroad companies for these purposes, either absolutely or if it should be reasonably convenient for them to do so; but rather it was the intention to make absolute the right to so use the rights of way of railroads should they desire to avail themselves of it. In other words, they are given the right generally to appropriate any lands actually necessary for their lines, and in addition, the specific right, subject to certain conditions, of using portions of the rights of way of railroad companies for such uses. This being true, the respondent had the right to condemn lands actually necessary for a right of way for its proposed telephone line, even though the lands sought to be appropriated lie adjacent to the right of way of a railroad company.

The judgments and orders of the superior court in both causes are therefore affirmed.

Crow, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

[No. 11485. Department Two. December 20, 1913.]

In the Matter of the Guardianship of NELS MARTENSON.
ANDREW MARTENSON, Appellant, v. GEORGE R. GARDNER
*et al., Respondents.*¹

INSANE PERSONS—GUARDIANS—APPOINTMENT—DISCRETION. It is not an abuse of discretion to refuse to appoint a brother, in preference to a stranger, as the guardian of an insane person, where it appears that there had been a misappropriation of his estate, and the property would probably not be recovered if the brother had been appointed.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 19, 1912, appointing a guardian upon a contested hearing before the court. Affirmed.

H. W. Lueders, for appellant.

Everal R. Vaughn and *F. W. Greenman*, for respondents.

FULLERTON, J.—On September 23, 1912, one Everal R. Vaughn petitioned the superior court of Pierce county to appoint a guardian for the estate of Nels Martenson, alleging in the petition that Martenson was an insane person, incarcerated in the state insane asylum at Steilacoom, Washington; that he had personal and real property situated in Pierce county which needed the care and attention of some proper person as guardian. The petition further alleged that one George R. Gardner was a suitable and proper person to be appointed as such guardian. On the filing of the petition, the court fixed a time and place for hearing the same, of which due notice was given as required by statute. At the time fixed for the hearing, Andrew Martenson, a brother of the insane person, appeared and contested the proceeding, averring in his pleadings that no necessity existed for appointing a guardian over his brother's estate, but that, if the court deemed such an appointment necessary, he himself was a suit-

¹Reported in 137 Pac. 340.

able and proper person to be appointed such guardian, and prayed for his own appointment. A hearing was had on the issues thus made, resulting in the appointment of the person named in the original petition. From the order of appointment made, the contestant appeals.

The evidence introduced at the hearing was brief, but brief as it is, it does not require a special review. Enough appears to show that there had been a probable misappropriation of the insane person's estate, and that it was not likely that the property misappropriated would be returned if the contestant was appointed guardian. Conceding that, under normal conditions, a brother has a preference right, over a person not so related, to be appointed guardian of his insane brother's estate, we find in the appointment here made no abuse of discretion on the part of the court.

The order appealed from is affirmed.

Crow, C. J., MOUNT, MORRIS, and PARKER, JJ., concur.

[No. 11467. Department Two. December 20, 1913.]

W. W. CRANDALL, *Respondent*, v. PUGET SOUND TRACTION,
LIGHT & POWER COMPANY *et al.*, *Appellants*.¹

JURY — PEREMPTORY CHALLENGE — STATUTORY RIGHT. Defendants sued jointly for tort must join in their peremptory challenges, even when their interests are antagonistic, under Rem. & Bal. Code, § 324, providing that either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it is made; since their right of peremptory challenge is purely statutory, and must be exercised in the manner granted.

APPEAL—REVIEW—RIGHT TO COMPLAIN—INSTRUCTIONS. Unnecessary repetition in instructions cannot be complained of, where there was unnecessary repetition in the instructions requested, and the repetitions were substantially as favorable to one side as to the other.

¹Reported in 137 Pac. 319.

TRIAL—INSTRUCTIONS—MEASURE OF DAMAGES—LIMIT—ISSUES AND PROOF. It is prejudicial error to fail in the instructions to limit the recovery to the amount alleged, and to authorize recovery of an item of damages as to which there was no evidence, notwithstanding the amount awarded was less than the amount claimed; since the effect on the verdict cannot be determined.

Appeal from a judgment of the superior court for King county, Humphries, J., entered March 15, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger on a street car in a collision with an automobile. Affirmed on condition of remitting \$100.

James B. Howe and *A. J. Falknor*, for appellant Puget Sound Traction, Light & Power Company.

Trefethen & Grinstead, for appellants Woodin.

Vanderveer & Cummings and *H. McC. Billingsley*, for respondent.

PARKER, J.—This is an action to recover damages which the plaintiff claims resulted to him from the concurring negligence of the defendants. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff, against the defendants, from which they have appealed separately.

The appellant Puget Sound Traction, Light & Power Company, hereinafter called "the company," owns and operates a cable street railway on James street, in Seattle. Appellant Scott P. Woodin is a physician practicing his profession in Seattle, concededly for the benefit of the community composed of himself and wife, and, in aid of his practice, he drives an automobile belonging to the community. On September 23, 1912, Dr. Woodin was driving southerly along Fourth avenue, in Seattle, approaching the intersection of that avenue and James street. As he neared James street, one of the defendant company's cable street cars was proceeding easterly along James street nearing Fourth avenue. A collision occurred between the automobile and the car at the

intersection of the avenue and street. The forward right wheel of the automobile first came in contact with the left running board of the cable car near its forward end, while both were in motion. At the time, respondent was a passenger on the cable car, standing on the left running board just back of the point of first contact. The car was crowded so that respondent was compelled to ride in this position. The momentum of the auto and cable car was such that the right side of the auto was thrown with great force around against the left side of the cable car where respondent was standing, resulting in serious injury to him, for which he seeks recovery, claiming that the injuries thus received were the result of the concurring negligence of both appellants. Respondent sought recovery from them jointly, alleging damages in the sum of \$7,639.20. The jury found in his favor by a general verdict in the sum of \$3,000.

During the empaneling of the jury, after the appellants had agreed jointly upon, and exercised, two peremptory challenges, they were unable to agree upon the exercise of a third peremptory challenge, and each then claimed the right to an additional peremptory challenge to be exercised separately. This the court denied, and the ruling thereon is assigned as error calling for a new trial. The court rested its ruling upon § 324, Rem. & Bal. Code (P. C. 81 § 559), providing as follows:

“Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges.”

The effect of this limitation upon the right of peremptory challenge was so thoroughly reviewed by Justice Rudkin, speaking for this court, in *Colfax Nat. Bank v. Davis*, 50 Wash. 92, 96 Pac. 823, as to leave little to be said in answer to appellants' contention, which, in this case, as evidently in that, was rested upon the fact that the interests of

the defendants in the result of the trial, are, in substance, antagonistic to each other, and that therefore they should be regarded as separate parties for the purpose of exercising peremptory challenge. It seems plain to us, as pointed out in the *Colfax Nat. Bank* case, that the answer to this contention is that the right of peremptory challenge is wholly a creature of statute, and not of common law. This being true, we are unable to see that this restriction which the legislature may place upon such right, in the granting of it, is any more an infringement of the rights of a party than if the legislature had withheld the right entirely, which, of course, could be done. Some contention seems to be made that the interests of the defendants in this case are of a more pronounced antagonistic nature than in the *Colfax Nat. Bank* case. The only difference we can see between the two cases is that the right to recover in this case is rested upon tort, while in that it was rested upon contract. We fail to recognize this as a difference in the principle involved. It seems plain to us that in this case, as in that, each defendant, while, of course, resisting the right of the plaintiff to recover in any event, was seeking to shift whatever recovery might be had upon the other defendant. In this way only were their interests antagonistic. We think it was not error to deny the right of a separate peremptory challenge to the defendants. The extent of the right of exercising, separately, challenge for cause by several defendants, we express no opinion upon. That question is not here nor was it in the *Colfax Nat. Bank* case. We are dealing only with a right existing solely because given by statute. *Manhattan Building Co. v. Seattle*, 52 Wash. 226, 100 Pac. 330.

Counsel for appellant company requested three separate instructions to be given by the court to the jury touching the relative rights and duties of a street car and an automobile upon a street intersection, both arriving there at nearly the same time. The substance of all these instructions is found in one reading as follows:

"I further instruct you that, if a driver of an automobile and a street car both desire to pass a given point at the same time, it is the duty of the driver of the automobile to yield the right of way to the street car since in the very nature of the case it is impossible for the street car to pass over other portions of the street while it is possible for the automobile to do so."

The court gave each of these three instructions as requested, adding, however, at the conclusion of each, the following, or words of similar import:

"Providing that at all times the defendant company used the highest degree of care for the protection of its passengers that was practically consistent with the reasonable operation of its car."

We do not gather from the briefs of appellant that any contention is made against these instructions as correct statements of the law, but the contention seems to be that the court unnecessarily repeated to the jury the concluding portion of each instruction touching the high degree of care required of the company in the protection of respondent as one of its passengers. In one or two places in the instructions given by the court, this same thought is repeated. The rule of the high degree of care required of the company was unnecessarily repeated by the court, but the same criticism, at least in a considerable measure, may be made against the three instructions requested to be given by counsel for appellant company. It seems to us that in both respects there was unnecessary repetition. The repetitions, we think, were substantially as favorable to one side as to the other, and do not call for a new trial.

The instruction of the court, touching the question of the highest amount which the jury might find in the respondent's favor, in the event they concluded he was entitled to damages, was as follows:

"I instruct you that, if you find for the plaintiff in this case, you will award him damages in such amount as will compensate him: for all pain and suffering, if any, which he

has undergone in the past, or will probably undergo in the future; and for any impairment, if any, of his physical health or functions, not exceeding together the sum of \$7,500; and for any expense which he may have incurred or must incur in the future, for medicine or medical attendance, not exceeding the further sum of \$189.20, making a total of \$7,689.20, which is the limit of your verdict.

This instruction, it is claimed, was erroneous in that it permitted the jury to find in respondent's favor at least \$100 more than the highest amount he would have been entitled to under any circumstances. Looking to the allegations of the items of damages in the complaint, we find that respondent there claimed \$7,500 for pain and suffering, and disability incurred; \$39.20 for hospital fees, drugs, and medicine; \$50 for doctors' bills incurred before the suit was commenced, and \$50 for prospective doctors' bills which he would be required to incur in the future because of his injuries. This, it will be noticed, totals only \$7,689.20. It is thus manifest that the instructions of the court fixed the limit of respondent's recovery at \$50 more than the amount alleged in the complaint. Besides this excess, there was no evidence whatever touching the amount of doctors' bills incurred, or to be incurred, except it was stipulated by counsel upon the trial that respondent had incurred \$50 for doctors' bills. It is apparent, therefore, that the total amount which the jury could have awarded respondent in any event was \$100 less than that which the court fixed as the limit of his recovery. We think that this was error which will entitle appellants to a new trial unless respondent remits from the award made to him by the verdict and judgment the sum of \$100. This case, in this regard, is exactly like that of *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400. Some contention is made that because the jury found in the sum of \$3,000 only, which is less than one-half of what they might have found, under the allegations of the complaint, no prejudice resulted from this instruction. The same situation appeared in the *Olson* case. In that case respondent recov-

ered only \$2,000, when the allegations of the complaint would have supported a recovery of \$10,000 and \$194 additional for medical attendance and hospital fees. In that case, there being no proof as to the latter items, the court held it was error for the court to instruct fixing the limit of the recovery so as to include those items. Manifestly, we have no way to determine what influence this instruction had upon the jury as to the item of doctors' fees. The jury may or may not have allowed such items in their verdict of \$3,000. Therefore, we cannot say that the instruction was without prejudice.

Contentions are made against the sufficiency of the evidence to sustain the verdict and judgment, in addition to the contention last above noticed. This question was raised by motion for nonsuit, motion for directed verdict, and motion for judgment notwithstanding the verdict; and involves the question of negligence of the respective appellants and the contributory negligence of respondent. We have read all of the evidence set forth in the abstract, and deem it sufficient to say that we are convinced that there is ample room for difference of opinion upon these questions. The same may be said as to the contention made against the verdict as being excessive. We are quite clear that we would not be justified in disturbing the verdict for want of support in the evidence, except in so far as doctors' fees may be included therein.

Because of error of the trial court in instructing the jury as to the limit of the respondent's recovery, we are of the opinion that appellants must be granted a new trial unless respondent will remit from the judgment the sum of \$100 within twenty days after the case is remanded to the trial court. In the event respondent does so remit, the judgment will be affirmed. Otherwise, the trial court is directed to grant appellants a new trial.

In view of this disposition of the cause, we conclude that costs incurred by appellants in presenting the question here

decided in their favor are fairly offset by costs incurred by the respondent in resisting contentions made by appellants and decided in respondent's favor. Therefore, neither party will recover costs in this court.

CROW, C. J., FULLERTON, and MOUNT, JJ., concur.

MORRIS, J., took no part.

[No. 11329. Department Two. December 20, 1913.]

G. L. SCHWARTZ, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY *et al.*, *Appellants*.¹

RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is not contributory negligence as a matter of law, for the driver of a team, waiting at a double track crossing for a freight train to pass south on the near track, to start to cross immediately after the last car had passed, where it appears that, at the point where he was waiting, he had a view of the approach of north-bound trains for a distance of nearly 700 feet, and he looked and neither saw nor heard a train, and the city speed limit for trains at that point was six miles and hour, and he was struck by a train going at least 10 miles an hour, after getting his horses across the far track.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$3,000 for injuries sustained when struck by a passenger train at a crossing is not excessive, where plaintiff was rendered unconscious, his wrist broken and crushed, and his shoulder badly injured, and his injuries were permanent.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered December 16, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained at a railroad crossing. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellants, contended, *inter alia*, that the plaintiff was guilty of contributory negligence. *Marty v. Chicago, St. P., M. & O. R. Co.*, 38 Minn. 108, 35 N. W. 670; *Fletcher v. Fitchburg*

¹Reported in 137 Pac. 317.

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R. Co., 149 Mass. 127, 21 N. E. 802, 3 L. R. A. 743; *Daniels v. Staten Island Rapid Transit Co.*, 125 N. Y. 407, 26 N. E. 466; *Kraus v. Pennsylvania R. Co.*, 139 Pa. St. 272, 20 Atl. 993; *McCrorry v. Chicago, M. & St. P. R. Co.*, 31 Fed. 531; *Stowell v. Erie R. Co.*, 98 Fed. 520; *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058; *Bardshar v. Seattle Elec. Co.*, 72 Wash. 300, 130 Pac. 101.

C. A. Studebaker and Forney & Ponder, for respondent.

MOUNT, J.—The plaintiff recovered a judgment of \$3,000 for personal injuries received by him on the 14th day of March, 1912, when he was struck by a passenger train of the defendant Northern Pacific Railway Company, at the Prindle street crossing in Chehalis, Washington. The defendants have appealed from that judgment.

The assignments of error are that the court refused to instruct the jury to return a verdict in favor of the appellants, in overruling the motion of the appellants for judgment notwithstanding the verdict, and in overruling the appellants' motion for a new trial. These assignments of error are all based upon the same ground, namely, that the evidence was insufficient to sustain the verdict, and that it shows that the respondent was guilty of contributory negligence.

The facts are, in substance, as follows: The appellant Northern Pacific Railway Company maintains and operates a double track railroad through the city of Chehalis. These tracks as they pass through the city of Chehalis run nearly north and south. Trains going south use the west track; those going north use the east track. These tracks are crossed at right angles by certain streets, the one where the accident occurred being called Prindle street, which is two blocks south of the depot. This street is one of the principal streets of the city which crosses the railway tracks. To the south of Prindle street, a distance of about 322 feet, a water tank is located on the right of way of the railway

company. At the Prindle street crossing, the railway company maintained an electric bell which, when in repair, would be set ringing by a north-bound train when it was 2,794 feet south of the crossing. The respondent, at the time of the accident and for more than two years prior thereto, had lived on the corner of State and Prindle streets, which is about a block west of the railroad tracks. He had crossed the tracks at this crossing two or three times daily, and sometimes more. On the day of the accident, and for a period of about two weeks prior to that time, this crossing bell was out of repair and it rang constantly. The respondent had observed this fact.

On the day of the accident, the respondent, who was a teamster by occupation, hitched his team to his wagon, about half past one o'clock, and started to drive up town to haul a load of coal. As he approached the crossing on Prindle street from the west, a freight train consisting entirely of box cars was moving south across Prindle street. He stopped his team about forty or fifty feet from the track upon which the freight train was moving and about on the west line of the right of way of the railway company. He testified that the engine of the freight train was about to the water tank. There were three or four cars yet to cross the street. He noticed that the gong or crossing bell was ringing, and he looked down the track toward the south to see if there was any train on the east track. He testified that he could see beyond the water tank down to Main street, a distance of about 698 feet, but there was no train in sight. The freight train obstructed his view of any other train that would be coming north behind the freight train. He also testified that, at the point where he looked, he had a better view than at any other point. About the time the last car of the freight train was crossing Prindle street, he started his team to drive over the crossing of the railway. As he emerged from behind the freight train, and as his team was upon the east track, he looked south and saw a passenger

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train coming. It was then too late for him to back his team off the track. He urged it forward and was struck by the engine of the passenger train and severely injured. The horses escaped injury. The wagon was demolished. He himself was rendered unconscious.

An ordinance of the city of Chehalis makes it unlawful for a railway train to pass over this street at a faster rate of speed than six miles per hour. It is apparently conceded that the train at that point was running at least ten miles per hour. There is evidence to the effect that it was running between twenty-five and forty miles per hour at the time it struck the respondent. It was a regular passenger train and was due at the station at one o'clock and thirty-two minutes. It was about eight minutes late upon this occasion. There was also evidence to the effect that the whistle was not blown nor the bell rang upon the engine of the passenger train. At any rate, the respondent testified that he did not hear the bell or the whistle.

The appellants strenuously argue that the respondent was guilty of contributory negligence in attempting to make the crossing over Prindle street immediately after the freight train had passed. A number of cases are cited to the effect that "where a highway crosses a double-track railway, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the second track is obstructed by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction on the second track." *Marty v. Chicago, St. P., M. & O. R. Co.*, 38 Minn. 108, 35 N. W. 670; and other cases to the same effect. The appellants seek to distinguish this case from the case of *Merwin v. Northern Pac. R. Co.*, 68 Wash. 617, 123 Pac. 1019, by reason of the fact that, in the case just cited, Merwin, at the time he reached the crossing, saw the Carbonado train approaching

which in no manner obstructed his view toward the north, the direction from which the train came which struck him and when Merwin stopped, just before the Carbonado train passed over the crossing, he looked to the east along the track and could see for a distance of from 1,500 to 2,000 feet and would have been able to see a train approaching from the east upon any of the tracks if a train had been within that distance of him, while, in this case, the freight train obstructed the respondent's view of the train upon the north-bound track which might have come from behind the freight train at any time before he went upon the tracks. But as we read the evidence of the respondent and of some of the other witnesses, it is to the effect that, at the place where the respondent stopped, he had a view of the approach of the north-bound train for a distance of nearly 700 feet; that he looked to see if any train was approaching from that direction while he had stopped, and immediately prior to passing upon the tracks, and saw and heard no train.

It is true that the gong was ringing which, if it had been in repair, would have notified the respondent that a train was approaching upon that track. But this gong, according to the evidence, and had been out of repair for two weeks; and upon the day of the accident and for two weeks prior thereto, had been constantly ringing, and the respondent knew of this fact. This bell, therefore, meant nothing to the respondent, because it is conceded that, when the bell was out of repair, it rang constantly, for, as appellants say, it erred on the side of safety. This no doubt would have been true if the respondent had not known that the bell was out of repair and continued to ring whether a train was approaching or not. Before he started to cross the tracks, he stopped, looked and listened, at a point which the evidence shows was the most advantageous point at which he might do so. He saw and heard no train approaching, though he had a view of about 700 feet to the south. It is true this view was obstructed somewhat by a water tank and by the

freight train which had just passed south. We are satisfied that, under these facts, the question of contributory negligence was one for the jury and not a question of law for the court. This case, we think, falls within the rule of the *Merwin* case, *supra*, and is controlled by it. It was therefore not error for the trial court to submit to the jury the question whether or not the respondent was guilty of contributory negligence.

The appellants contend that the verdict is excessive. The respondent was badly injured. He was rendered unconscious at the time of the accident; his wrist was broken and the bones of his wrist were crushed; his shoulder was badly injured. Evidence was introduced at the trial to show that the injury to the wrist would be permanent. We think, under the circumstances, that a verdict for \$3,000 is not so excessive as to warrant a reduction thereof.

The judgment is therefore affirmed.

CROW, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 11484. Department Two. December 20, 1913.]

REVILLA FISH PRODUCTS COMPANY, *Appellant*, v. AMERICAN-HAWAIIAN STEAMSHIP COMPANY, *Respondent*.¹

TRIAL—INSTRUCTIONS—CONFUSING INSTRUCTIONS. Instructions are so confusing and misleading as to require a reversal, where the jury were told that a certain fact does "not" prevent recovery, the instruction was then reread, leaving out the word not, giving a contrary meaning, the instructions were read to the jury as the law, and part of them denied, followed by a colloquy with counsel as to whether they correctly stated the law and this course followed throughout, from which the jury could get no clear idea; especially where other instructions gave contradictory rules.

CARRIERS—CONTRACT—ACTION FOR BREACH—DEFENSES. A shipper of oil cannot recover for loss occasioned by reason of shipping in improper retainers; not because of any contributory negligence, but

¹Reported in 137 Pac. 337.

because such exception abrogates the common law liability of the carrier.

CARRIERS—CONTRACTS—BILL OF LADING—ACCEPTANCE—EFFECT—MODIFICATION OF CONTRACT. Where a bill of lading is requested and sent to the shipper after the shipment has started, for the purpose of attaching it to a draft on a sale of the goods "against document," the shipper has a right to assume that it will contain no stipulations other than those agreed upon; hence the shipper would not be bound by unauthorized limitations in the bill, unless, in addition to the receipt of the bill, the shipper actually consented thereto by receiving and accepting the bill as a modification of the contract.

Appeal from a judgment of the superior court for King county, Humphries, J., entered May 5, 1913, upon the verdict of a jury rendered in favor of the defendant, in an action for breach of a contract of carriage. Reversed.

Arctander, Halls & Jacobsen, for appellant.

Hughes, McMicken, Dovell & Ramsey and *Otto B. Rupp*, for respondent.

MORRIS, J.—Appeal from a judgment entered upon verdict in an action brought to recover damages for breach of contract of carriage of 155 barrels of fish oil from Seattle to New York. The appellant was located at Ketchikan, Alaska, and between October 21, 1911, and November 15, 1911, several cablegrams and letters passed between the parties relative to the terms and conditions of the shipment between Seattle and New York, in which the amount of the shipment, the size, weight, and measurement of the barrels in which it was to be contained, and the rate to be charged, were arranged. These matters being determined, the oil was shipped on the steamer *Bertha* at Ketchikan and arrived at Seattle on November 15. On arrival at Seattle, some of the barrels were found to be leaking. These were recoopered and the oil was then loaded on the steamer *Virginian*, which sailed on November 30. On December 2, respondent mailed a bill of lading to appellant at Ketchikan, which was received on December 11. The shipment was in

a bad condition on its arrival at New York, and this action was brought seeking to charge respondent with the loss. Respondent sought to show in defense, (1) that the loss was due to improper and insufficient containers, and (2) that it was exempt from liability by reason of the exceptions contained in the bill of lading. To these defenses, appellant replied, and the cause went to trial, resulting in a verdict for respondent.

A great many errors are charged against the lower court. We will, however, in view of the conclusions we have reached, consider only a few of them. The record discloses the following as a part of, and occurring during the reading, of the instructions:

“If you find from the evidence that plaintiff was guilty of negligence in shipping the oil in containers such as the evidence shows were used, this does *not* prevent plaintiff's recovery in this case if you also find from the evidence that defendant's way of stowing and carrying the barrels on end, provided you find that to be the case, contributed in a material degree to the loss.’ I will read that over: ‘If you find from the evidence that plaintiff was guilty of negligence in shipping the oil in containers such as the evidence shows were used, this does prevent plaintiff's recovery in this case if you also find from the evidence that defendant's way of stowing and carrying the barrels on end, provided you find that to be the case, contributed in a material degree to the loss.’ Mr. Arctander: I suppose Your Honor means there, if you change it in that way, that it should be that—The Court: (interrupting) That if you are guilty of negligence and they are guilty of negligence and you both contributed to it and by that means the oil was lost, you cannot recover. Mr. Arctander: But Your Honor means to read instead of ‘if’ the word ‘unless’—‘in this case unless you also find from the evidence that defendant's way of—don't you? The Court: Where? Mr. Arctander: In the fourth line; ‘in this case unless you also find from the evidence’—you say that it does prevent plaintiff's recovery unless—The Court: (interrupting) ‘If you find from the evidence that plaintiff was guilty of negligence in shipping the oil in containers such as the evidence shows were used, this does prevent plain-

tiff's recovery in this case if you also find from the evidence that defendant's way of stowing and carrying the barrels on end, provided you find that to be the case, contributed in a material degree to the loss.' Mr. Arctander: Well, that should be 'unless' instead of 'if' then; otherwise there is no sense in it. The Court: How is that? Where is the 'if' do you think? Mr. Arctander: In the fourth line, Your Honor—'it does prevent his recovery unless the defendant by stowing them on end materially contributed to the loss.' That is the way it should read, shouldn't it? The Court: No, I guess that reads all right. Mr. Arctander: All right. The Court: (continuing) 'this does prevent plaintiff's recovery in this case if you also find from the evidence that defendant's way of stowing and carrying the barrels on end, provided you find that to be the case, contributed in a material degree to the loss.' That is what I wanted to say. If you are both guilty of negligence in the manner of handling this cargo, you cannot recover. 'If you find from the evidence that the oil was delivered to defendant in Seattle in good order and condition, that on its arrival in New York City there was a loss of 2,694 gallons of oil, then and in that case the presumption arises that the loss was caused by the negligence of the defendant.' I denied that instruction, and give you an exception. Mr. Rupp: In other words, that the jury may understand it, you say that is not the law. The Court: Well, I refuse that instruction. Mr. Rupp: Yes, but you read it to them and they might get it— The Court: (interrupting) I withdraw that from the jury. I will read it so that you can see what I have withdrawn: 'If you find from the evidence that the oil was delivered to defendant in Seattle in good order and condition, that on its arrival in New York City there was a loss of 2,694 gallons of oil, then and in that case the presumption arises that the loss was caused by the negligence of the defendant.' Now, I have withdrawn that instruction from the jury. Mr. Rupp: They understand that that is not given by you as the law? The Court: It is marked 'denied,' not given by me as the law. 'If you find from the evidence that the 155 barrels of oil were delivered to defendant in Seattle in good order and condition, and that on arrival in New York one barrel was missing entirely, one was broken to pieces, a great number of barrels entirely or partially empty, while a considerable num-

ber of them was in the exact condition as to weight as when received in Seattle, provided that in your judgment such facts are established by the evidence, then and in that case such facts, if they be facts, raise the presumption that the loss of the oil was caused by the negligence of the defendant.' I don't think so; I will deny that also. Mr. Rupp: In other words, if I may interrupt you, you want to instruct the jury that that is not the law? The Court: I do not instruct them that that is the law. You can argue that when you come to argue the case. Mr. Rupp: Well, I wanted to make it plain to the jury that you did not tell them that was the law. The Court: Yes, I do not tell the jury that is the law. I am not permitted to comment on these matters. Mr. Rupp: I recognize that. The Court: I can't stop to explain why."

This, it seems to us, was so confusing and misleading to the jury that it may safely be assumed that the average juror would, at the conclusion of the court's charge, have at best a very vague conception and understanding of the law that was to govern him in his determination. The trial judge first says, if the evidence discloses that appellant was negligent in shipping the oil in the containers used, "this does not prevent" recovery, if it also found that respondent improperly stowed and carried the barrels and thus contributed to the loss. This instruction is then re-read, leaving out the word "not," thus giving a contrary meaning to the instruction from that first read and leaving it confusing and unintelligible, unless the jury could comprehend that the court was endeavoring to charge them upon the law of contributory negligence, which rule, as this was an action upon a contract and not upon tort, had no place in the case except in so far as it is the law that, in cases of this kind, the shipper cannot recover where the loss is occasioned by reason of shipping goods in improper containers or packages or of inherent qualities or defects in the goods themselves; not because of any theory of contributory negligence, but because these exceptions abrogate the common law liability of the carrier.

The court then proceeds to read instructions, and enters into a colloquy with counsel as to whether such instruction

as read is a correct statement of the law. The first of these instructions is then withdrawn, the court evidently concluding that it is not the law. The second, however, is not withdrawn, the court contenting himself with saying that he does not tell the jury it is the law, neither does he tell them it is not the law. It is bad practice—sufficient, it seems to us, to endanger any verdict—for the trial judge to read instructions to the jury and not determine until after they are read whether they should be given or not; and when this course is followed throughout the charge, it must be difficult for the jury to say what must be accepted and what must be rejected; especially in view of what was said to the jury in other instructions, in which they were told that, in the absence of exempting stipulations, the respondent would be liable for the loss unless the loss was due *solely* to the negligence of the shipper.

Again, an instruction is given that, in order to defeat recovery, it must appear that the oil was shipped in improper containers, and that this *alone* was the cause of the loss, which must be shown by a preponderance of the evidence. In another instance, the jury is told that, if the containers were unsuitable or insufficient by reason of the route or changes of climate, the appellant could not recover. Under this instruction, the mere fact is sufficient to defeat recovery. Under another, this would not defeat recovery unless it was the *sole* cause of the loss. Under a third instruction, it would defeat recovery if it *contributed to*, or was *one* of the facts occasioning the loss. It seems to us that nothing more need be said to establish the confusing and contradictory features of these instructions. The issues in this case were simple, and a few well chosen instructions could have submitted to the jury all that they were called upon to decide. The appellant was entitled to recover, having established its loss, unless the respondent was excused from liability by reason of the fact that the oil was not shipped in proper containers, which

caused the loss; or it had, by reason of the bill of lading, exempted itself from the cause of the damage.

And this brings us to another question necessary to be discussed. It is claimed that the court erred in admitting the bill of lading in evidence, it being appellant's contention that the bill of lading was no part of the contract nor any evidence thereof. This claim is based upon the fact that the bill of lading was not issued until after the oil was loaded upon the Virginian and the voyage begun. We think, however, because of what will hereafter be referred to, this fact is not alone determinative of the question, and that issue has presented a question of fact which must determine the effect to be given the bill of lading. The appellant, in one of its letters, requested: "Please have bill of lading made out, sending us one original and two first copies." In another it said: "We are as yet without bills of lading from you which we requested you to send us." The president and manager of appellant testified that he received the bill of lading, and that he requested the same because, the oil having been sold "cash against document," it was necessary to attach a bill of lading to the draft in order to obtain the purchase price of the oil; that he did not read the stipulations on the back of the bill of lading, but that he had been in the habit of shipping goods under bills of lading, and in a general way was familiar with the stipulations made use of by shipping companies in the effort to exempt or lessen their liability.

This evidence, it seems to us, presents some questions of fact as well as law, and that the court could not, under the circumstances, determine the effect to be given this bill of lading. The court charged the jury that, in giving effect to the bill of lading, they were to be governed by four considerations, three of which are immaterial to this feature of our discussion. The fourth was that, in order to defeat appellant's recovery, the jury must be satisfied that the bill of lading was received by appellant at the time of the delivery of the oil to the respondent, and not after the control

had passed from appellant to respondent, nor after the transportation had begun, "unless the bill of lading was to be sent to plaintiff." This last clause we think made this instruction bad. It is clear that the oil was shipped and on board the *Virginian* before the bill of lading was sent to appellant. From this it can be argued that both parties understood and agreed that the terms of the shipment were as determined by the correspondence between the parties, and that when appellant requested a bill of lading it had a right to assume that no stipulations other than those agreed upon should be incorporated in it, and that no attempt would be made by respondent to change the terms of the contract from those mentioned in the correspondence; and that, with this understanding and for the purpose indicated by the testimony of its president, it requested the bill of lading. If this should be found to be the fact, then it was error to charge the jury that, if the bill of lading was to be sent to the appellant, it was bound by its terms, as this would make the mere mailing of the bill of lading sufficient to bind appellant to all its stipulations. We do not think this is the law.

On the other hand, conceding that the terms of shipment had been agreed upon, it was nevertheless competent for the parties to modify those terms by additional ones or by a substitution of the contract as contained in the bill of lading. It was, therefore, under this phase of the case, a question of fact for the jury to determine whether, under all the circumstances as testified to by the president of appellant, his request for a bill of lading, his general knowledge of the stipulations contained therein, it was his understanding that the contract, in so far as it had been determined by the cablegrams and letters, was to be merged in and the oil carried subject to conditions and exceptions named in the bill of lading. We think something more than the sending of the bill of lading or its receipt was necessary to subject appellant to its terms, and that it must be found that there was an actual assent to the conditions in the bill of lading, and that in addition to

its receipt, the bill of lading was received and accepted by the appellant as a contract under which the oil was to be shipped. Scrutton, *Charter Parties and Bills of Lading*, pp. 9, 40; Carver, *Carriage by Sea*, §§ 56, 57, 58; 4 Cyc. 407; 4 Am. & Eng. Ency. Law (2d ed.), 517.

The case of *The Arctic Bird*, 109 Fed. 167, is very similar to that before us, and in it will be found a clear exposition of the law as we have attempted to declare it. This rule is also recognized in *The Caledonia*, 43 Fed. 681. The error of this instruction is clear by reference to our own holding in *Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co.*, 42 Wash. 64, 84 Pac. 620, where, in discussing the effect of a bill of lading handed the shipper after the shipment of the goods, it was said, citing 6 Am. & Eng. Ency. Law (2d ed.), 642:

"It is therefore of no effect where it is brought to the knowledge of the shipper after the goods have been shipped and it is too late for him to recede."

We therefore conclude that the judgment ought not to stand, and it is reversed and a new trial ordered.

CROW, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 11027. Department Two. December 23, 1913.]

LAURA S. HUNT, *Appellant*, v. G. S. ALLISON, *Respondent*.¹

FRAUD—MISREPRESENTATIONS—MEASURE OF DAMAGES—INSTRUCTIONS. The measure of damages for false representations as to the strength of the walls of a building sold to plaintiff, is the difference between what the building was actually worth at the time of the sale, and what it would have been worth if as represented; and it is error to instruct that the measure is the sum which it would have been necessary to expend to make the walls as represented.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS TO EVIDENCE. An objection that the evidence of certain damages was incompetent, irrelevant and immaterial is sufficient to raise the point that the same was not the true measure of damages; especially where such measure was not subsequently acquiesced in.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered October 4, 1912, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Affirmed.

Graves, Kizer & Graves, for appellant.

Danson, Williams & Danson and *Cannon, Ferris & Swan* (George D. Lantz, of counsel), for respondent.

MAIN, J.—The purpose of this action was to recover damages alleged to be due on account of fraudulent representations.

On July 24, 1907, the Spokane International Railway Company leased to the defendant lot 15, situated in its terminal grounds, in the city of Spokane. The lease provided that the defendant was to erect a building upon the premises, to be used as a warehouse, sales room, and for cold storage and mercantile purposes.

Shortly thereafter, the defendant caused to be organized, under the laws of the state of Washington, a corporation, bearing the name of the International Storage Company.

¹Reported in 137 Pac. 322.

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After the organization of this company, the lease was assigned to it with the consent of the lessor. The corporation erected upon the premises a two-story brick building equipped as a cold storage plant, in accordance with the terms of the lease. On or about the 1st day of July, 1911, the plaintiff contracted to purchase the lease and building for the sum of \$18,000. The railway company refused to consent to an assignment of the lease by the corporation to the plaintiff. The corporation owned no other property, and its capital stock was all owned by the defendant. When the railway company refused to consent to the assignment of the lease, the defendant sold and transferred to the plaintiff the entire capital stock of the corporation, thereby investing her with the ownership of the building and the lease.

The plaintiff claims that she was induced to make this purchase by the representation of the defendant that the walls of the building were of sufficient strength to sustain two additional stories if, at any time, it were thought advisable to so erect them. The charge of fraud is the misrepresentation as to the strength of the existing walls, they not having sufficient strength to sustain the additional stories.

There are other allegations of damages sustained by reason of misrepresentations of the defendant with regard to the cold storage equipment and machinery. It is unnecessary, however, to further mention these, as the only error assigned is predicated upon the court's action in granting the defendant's motion for a new trial, upon the ground that error had been committed in that the jury were incorrectly instructed as to the measure of damages.

During the trial, the plaintiff offered evidence tending to show what it would cost to reconstruct the walls and make them of the strength which she claimed they were represented to be. This evidence was objected to by the defendant on the ground that it was incompetent, irrelevant and immaterial. The defendant offered no evidence on the question of damages. At the conclusion of the plaintiff's evidence, and

also at the conclusion of the case, the defendant moved the court to withdraw the case from the jury on the ground, among others, that there was a failure and absence of proof. These motions were denied. The jury returned a verdict in favor of the plaintiff upon the two causes of action. Motion for new trial being made, the court sustained it as to the first cause of action because, as it believed, it had improperly instructed the jury as to the measure of damages; and overruled the motion as to the second cause of action. The plaintiff appeals.

The trial court, in submitting the cause to the jury, gave the following instruction upon the measure of damages relative to the walls of the building not being as it was claimed they had been represented:

"I charge you that if the defendant or his agent, George W. Paine, stated to the plaintiff as a fact and the plaintiff relied upon it that the walls of the building in question were built so as to carry two additional stories, and that said statement was untrue, and that plaintiff did not know the same was untrue, then I charge you that the plaintiff is entitled to recover such sum as was necessary to be expended at the time of the sale in order to make said walls carry said two additional stories, together with interest thereon from the date of the purchase of said stock at the rate of six per cent per annum."

This instruction, in substance, tells the jury that the measure of damages is the sum which it would have been necessary to expend at the time of the sale in order to make the walls sufficiently strong to carry two additional stories.

The respondent, on the same question, requested an instruction as follows:

"The jury are instructed that, on the measure of recovery, if any, for the alleged misrepresentation as to the strength or thickness of the walls of the building, if you find that such misrepresentations were made, that the plaintiff is entitled to recover the difference between what the building was actually worth at the time of such sale, and

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what it would have been worth if the walls had been of the strength and thickness as represented."

The substance of this instruction is that the correct measure of damages was the difference between what the building was actually worth at the time of the sale, and what it would have been worth if the walls had been of the strength represented. The instruction given does not contain a correct statement of the law. The instruction requested and refused states the rule correctly. Where property is sold and the purchaser subsequently brings an action charging fraudulent representations, the measure of damages is the difference between the value of the property transferred at the time of the sale and what its value would have been if it had been as represented. 4 Sutherland, Damages (3d ed.), § 1171; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938; *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496, 135 Am. St. 971; *Hanna-Breckinridge Co. v. Holley-Matthews Mfg. Co.*, 160 Mo. App. 437, 140 S. W. 923; *Mair v. Williams* (S. D.), 136 N. W. 1086.

It is claimed, however, that the respondent acquiesced in the rule of damages as stated in the instruction given, and therefore the court was in error in granting the motion for new trial. We find no merit in this contention. When the appellant's evidence as to the measure of damages was offered, the respondent objected, it is true, only on the grounds that it was irrelevant, incompetent and immaterial. If the evidence offered did not tend to prove damages which could be recovered, obviously it would be immaterial and would have no place in the case. Though the objection made did not as fully advise the court of the reasons for it as might have been done, it shows, at least, that the respondent did not acquiesce in the introduction of the evidence. In addition to this, the respondent seasonably interposed a motion that the case be taken from the jury; and subsequently requested an

instruction which correctly defined the measure of damages.

The judgment will be affirmed.

Crow, C. J., ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 11441. Department One. December 26, 1913.]

WILLIS C. THORP, *Appellant*, v. JOSEPH METZGER *et al.*,
Respondents.¹

EXTRADITION—INTERSTATE—REQUISITES. Under the U. S. Const., art. 4, § 2, and U. S. Rev. Stat. § 5278, providing for interstate extradition of fugitives from justice, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled, and the demand must be accompanied by a copy of the indictment or an affidavit made before a magistrate charging the commission of a crime, which copy must be certified to be by the executive of the demanding state.

HABEAS CORPUS—RETURN—DEMURRER. In a habeas corpus to release a prisoner, a demurrer to the officer's return admits all the allegations thereof.

EXTRADITION—INTERSTATE—WARRANT—SUFFICIENCY. An executive warrant for the extradition of a fugitive from justice need not define the crime with which the accused is charged, where it recites that he was charged with a crime, and was accompanied by the certified copy of the indictment or the charge made before a magistrate, as required by the act of Congress.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered May 10, 1913, dismissing a habeas corpus proceeding, upon sustaining a demurrer to the petition. Affirmed.

H. J. Snively, for appellant.

The Attorney General and *John M. Wilson*, *Assistant*, for respondents.

MAIN, J.—The appellant Willis C. Thorp, was arrested in Yakima county, this state, by virtue of an executive warrant issued by the governor of the state of Washington, upon

¹Reported in 137 Pac. 330.

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Opinion Per MAIR, J.

a requisition from the governor of the state of Oregon. Omitting the formal parts, this warrant was as follows:

"Whereas, It has been represented to me by His Excellency, Oswald West, governor of the state of Oregon, that Coleman Calhoun and William Thorp stand charged in said state with the crime of buying and receiving stolen property committed in the county of Crook, in said state and have taken refuge in the state of Washington,

"And Whereas, The said governor of the state of Oregon has, pursuant to the constitution and laws of the United States, demanded of me that I cause the said Coleman Calhoun and William Thorp to be arrested and delivered to W. E. Van Allen, agent authorized to receive them into his custody and convey them back to said state of Oregon;

"And Whereas, Said representation and demand are accompanied by affidavits, complaint, information, indictment and warrant whereby the said Coleman Calhoun and William Thorp are charged with the said crime, and being a fugitive from the justice of said state, and having taken refuge in the state of Washington, which are certified by said governor of Oregon to be duly authenticated;

"Now Therefore, I, Ernest Lister, governor of the state of Washington, do hereby authorize and empower W. E. Van Allen, the agent named in said demand, to take the said Coleman Calhoun and William Thorp wherever they may be found in this state, and transfer them to the line thereof at the expense of the state of Oregon, and I hereby command all civil officers within the said state of Washington to afford all needful assistance for the execution of this warrant.

"In Testimony Whereof, I have hereunto set my hand and caused the seal of said state to be affixed at Olympia, this seventh day of May, A. D. 1913."

After the appellant was taken into custody, he petitioned the superior court for a writ of habeas corpus. The writ was issued, requiring the respondents to produce the body of the appellant in court at a time stated, and make return to the writ. The return set out a copy of the executive warrant by virtue of which the appellant had been arrested. To this return, a demurrer was interposed, which was overruled. The appellant elected to stand on the demurrer, and refused

to plead further. The court thereupon entered a judgment dismissing the petition and remanding the appellant to the custody of the respondents. From this judgment, the appeal is prosecuted.

The only question here presented is whether the return of the respondents is sufficient to justify the extradition of the appellant. The power and authority to extradite is found in § 2, of article 4, of the constitution of the United States, which provides:

“A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.”

The procedure necessary to exercise the power conferred by the constitution is found in § 5278 of the revised statutes of the United States, which provides:

“Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.”

By this constitutional provision and Congressional enactment, three things are necessary in order to authorize the

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executive of one state to order the return of a fugitive from justice to the state in which the crime was committed: First, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled; second, the demand must be accompanied by a copy of the indictment, or an affidavit made before a magistrate charging the fugitive with having committed a crime in the demanding state; and third, a copy of the indictment or affidavit must be certified to by the executive of the demanding state. In *In re Foye*, 21 Wash. 250, 57 Pac. 825, speaking of the above mentioned constitutional provision and the act of Congress, it was said:

"It will be observed that there are three things requisite in order to authorize the executive authority of a state to extradite a fugitive from justice, and they are these: First, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled; second, such demand must be accompanied by a copy of an indictment found, or an affidavit made, before a magistrate charging the fugitive with having committed a crime in the demanding state; and third, such copy of the indictment or affidavit must be certified by the executive of the demanding state to be authentic. An extradition warrant, in order to be valid, should show upon its face a compliance with these requisites and necessary conditions."

In the present case, the executive warrant which was made a part of the return recited: First, that the appellant was charged in the state of Oregon with the crime of buying and receiving stolen property; second, that he was a fugitive from justice from the state in which the crime is alleged to have been committed; third, that a demand had been made by the governor of the state of Oregon that the appellant be arrested and delivered to one W. E. Van Allen, the agent authorized to receive him; fourth, that the representation and demand of the state of Oregon was accompanied by a copy of the complaint, information or indictment whereby the appellant was charged with the crime stated; and fifth, that the indictment, complaint, or information accompanying the de-

mand were certified by the governor of Oregon to be authentic. The appellant, by electing to stand on his demurrer to the return, thereby admitted all the allegations thereof.

It is argued that, since the warrant only recites that the appellant is charged with the crime of receiving stolen property, and not with "knowingly" receiving such property, the superior court erroneously dismissed the proceeding. This argument is based on the assumption that, a copy of the indictment or information not being made a part of the return, it was necessary that the executive warrant define the crime with which the appellant was charged. With this contention, we cannot agree. No such requirement can be found in either the section of the constitution or the act of Congress above quoted. The warrant recited that the appellant was charged with a crime. The demurrer admitted this fact. The warrant is sufficient when it recites the requirements of the law. In *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438, speaking of the requirements of an executive warrant in an extradition proceeding, it was said:

"It is enough that the warrant recites what the law requires. We cannot add to it new conditions. The argument founded upon the characteristics of ordinary criminal warrants for the apprehension of persons accused, and of indictments for specific crimes, has no application to the executive warrant in cases of extradition. . . . Nothing in its inherent nature or the purpose which it subserves requires that it should do more than show, by an explicit statement, that the person arrested is charged with a crime committed in the demanding state."

The judgment will be affirmed.

Crow, C. J., ELLIS, CHADWICK, and GOSE, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 11162. Department One. December 26, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v. FLORENCE
PETTIT, *Appellant*, C. M. PETTIT, *Defendant*.¹

CRIMINAL LAW—RES GESTAE—LARCENY. Upon a prosecution for larceny by embezzlement, evidence that, after obtaining the money, the accused made purchases of valuable personal property, is admissible as part of the *res gestae*, and to show motive by acts and conduct.

SAME—EVIDENCE—ACTS OF CONSPIRATORS. Upon a prosecution for larceny by embezzlement, evidence of the acts and conduct of a codefendant in furtherance of a common criminal design, where there was concert of action, is competent and relevant, whether before or after the asportation.

SAME—"FLIGHT"—INSTRUCTIONS. An instruction on the subject of flight as showing a guilty knowledge or qualified admission of guilt, that flight is a departure from the locality of the crime and residence of the accused induced or caused in any degree by fear of arrest or consciousness of guilt, is proper; and it is not necessary for the jury to further find a purpose to escape or concealment to avoid arrest.

APPEAL—REVIEW—INSTRUCTIONS—REQUESTS. It is not necessary to give instructions in the form requested, where the same were fully covered in the instructions given.

Appeal from a judgment of the superior court for Snohomish county, Kellogg, J., entered June 22, 1912, upon a trial and conviction of grand larceny. Affirmed.

Morris & Shipley and *Hulbert & Husted*, for appellant.

R. J. Fausett and *Joseph H. Smith*, for respondent.

CHADWICK, J.—Appellant was jointly indicted with her husband upon a charge of grand larceny. After a separate trial and a judgment of conviction, she has appealed to this court.

The evidence is substantially the same as that given at the trial of her husband, and we will not undertake to restate the facts, but content ourselves by referring to the case

¹Reported in 137 Pac. 335.

of *State v. Pettit*, 74 Wash. 510, 133 Pac. 1014. All of the questions raised in this case were settled in our former opinion, except the following:

The sum of money originally possessed by Mrs. Martin, the prosecuting witness, was \$3,197. The amount deposited and first accounted for by Mrs. Pettit was \$3,000. The court allowed the prosecuting witness to testify that, after the time of the deposit and the time when the note was given, Mrs. Pettit had made purchases of valuable personal property. We think that this evidence was properly received as a part of the *res gestae*. The actions and conduct and conversation of the parties, from the time the money first came into the possession of the appellant, was competent to show the motive and intent of appellant, and no error can be predicated on the ruling of the court.

It is also contended that the court erred in admitting the acts and conduct of C. M. Pettit, the codefendant, after the time of the larceny. We think this evidence was properly admitted. The evidence is ample to sustain the theory of conspiracy, and under the authority of the husband's case (*supra*), it may be laid down as a rule that, where there is a concert of action and a common criminal design, every act done in furtherance thereof, whether before or after the time the property was actually asported, is competent and relevant.

It is contended that the court misdirected the jury, in that it submitted the question of the flight of the appellant after the crime is alleged to have been committed. Counsel insists that the instruction tells the jury that flight is no more than a departure from the locality of the commission of the crime and from the place of residence of the accused when induced or caused in any degree by fear of arrest or consciousness of guilt; that this definition leaves out of consideration the idea of escape and concealment for the purpose of avoiding the arrest, which is the essential characteristic of the term "flight" as used in criminal law.

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We had not hitherto understood that the word flight had any such restricted meaning, but if so, we think a departure from the place of the crime induced by fear of arrest is sufficient to satisfy the law. So far as we have been able to find, the books make no nice or refined distinction as to the manner or method of a flight. It may be open or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. The conduct of the party charged, immediately following the commission of a crime, is competent to show a guilty knowledge and is received as a qualified admission of guilt. Its evidentiary weight is a question for the jury. Jones, Evidence (2d ed.), § 287; 12 Cyc. 395.

The court's definition is broad enough to cover the objections made by counsel. In such cases, the verdict cannot be measured by what any one witness says. Nor is the jury bound to accept a defendant's explanation as to his motive. They may consider all the facts and circumstances and from them draw their own conclusions. When so considered, we have no doubt of the fact that appellant did flee the jurisdiction of the courts of this state, and that her purpose was to avoid arrest. It would be carrying the law too far to say that, in such cases, a jury would have to go further and find that there was an added purpose of escape and concealment for the purpose of avoiding arrest.

Objections are also made to certain instructions given by the court. We have read the instructions with care and are satisfied that, when considered as a whole, they fairly state the law of the case, and that appellant has not been prejudiced thereby.

Error is predicated on the refusal of the court to give an instruction requested by the appellant and designed to present to the jury the theory of contract; that is, that, if the jury should find from the evidence that the money was borrowed, that appellant should be acquitted. While the court refused the instruction requested by the appellant, an instruction fully covering defendant's theory of the case was

given by the court. The trial court is not bound to give instructions in the form requested. Its duty is to state the law of the case, and this it did.

Finding no error, the judgment is affirmed.

Crow, C. J., ELLIS, MAIN, and GOSE, JJ., concur.

[No. 11362. Department One. December 26, 1913.]

GEORGE BAKER *et al.*, *Respondents*, v. YAKIMA VALLEY
CANAL COMPANY, *Appellant*.¹

MECHANICS' LIENS — PERSONS ENTITLED — SUBCONTRACTOR OR MATERIALMEN — LABORERS EMPLOYED BY MATERIALMEN — STATUTES — CONSTRUCTION. One who contracts to furnish, from his own screening plant, at so much per yard, all the sand and gravel needed for cement work by a contractor on an irrigating canal, is not a subcontractor, but a materialman, and men employed by and looking to him for their pay are not entitled to a lien as laborers performing work on the canal; in view of the distinction between subcontractors and materialmen made by Rem. & Bal. Code, § 1129, giving liens to every person performing labor upon or furnishing materials to be used in the construction of the canal, at the instance of the owner or his agent, and making contractors, subcontractors etc. agents of the owner; since no lien is accorded to laborers of materialmen, who are not made agents of the owner.

SAME — MATERIALMEN — NECESSITY OF NOTICE — SUBROGATION. Unpaid laborers working for a materialman could not be subrogated to the right of a materialman's lien, where no notice in writing was given to the owner of the furnishing of the materials as required by 3 Rem. & Bal. Code, § 1133.

APPEAL — REVIEW — FINDINGS. In actions tried to the court there is a trial *de novo* on appeal, and the findings will be sustained only when supported by a fair preponderance of the evidence.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered October 7, 1912, upon findings in favor of the plaintiffs, in an action to foreclose labor liens. Reversed.

¹Reported in 137 Pac. 342.

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Opinion Per ELLIS, J.

*Englehart & Rigg and H. J. Snively, for appellant.**Roberts & Udell, for respondents.*

ELLIS, J.—The plaintiffs in this action seek to establish liens upon the irrigating canal of the defendant Yakima Valley Canal Company, for labor performed by them for the defendant Betts in screening sand and gravel used by defendant Powell in reconstructing the canal.

The facts are simple and practically undisputed. The defendant W. F. Powell entered into a written contract with the defendant canal company to reconstruct approximately 11,000 feet of its canal, according to certain plans and specifications, and at his own cost and expense, to perform all the work and furnish all the materials called for in the specifications, excepting the reinforcing steel. The work called for in the specifications was the excavation and grading of the foundations for the flume, and the construction of a reinforced concrete flume thereon, and, at one point, a concrete siphon. The defendant canal company owned the right of way upon which the canal was reconstructed. The work was done, and materials used were cement, sand, gravel and steel. The sand, gravel and cement were mixed together and, with the reinforcing steel, constituted the finished structure.

The evidence is too plain for controversy that the defendant W. C. Betts made an oral agreement with Powell to furnish sand and gravel at an agreed price of sixty-five cents a yard. Betts had his own screening machinery and sand and gravel bins, and was to deliver the materials in his own bins, from which Powell was to haul them to the place of construction. Betts set up his machinery at a certain sand bar, in the Natchez river, at a point about two hundred yards from the nearest point of the canal right of way, and about one-fourth of a mile from the place where the work of reconstruction was in progress. The plaintiffs were employed by Betts in scraping up, screening, and separating the sand and gravel, storing these materials in the bins, and in running

machinery for that purpose. As to the agreement with Betts, Powell testified: "He was to furnish me the sand and gravel for so much a yard in the bins at his machine." The witness Hillis Betts, son of the defendant W. C. Betts, testified that he did not know the particulars of the agreement, but that, as he understood it, his father was to furnish gravel for the work from the Natchez river, and that the plaintiffs were employed to scrape the gravel up into the elevator with slip scrapers; that the elevator carried it to a rotary screen, and the screen dropped it into the bins and bunkers, from which Powell's teams took it away. The defendant W. C. Betts, testifying to what his agreement was, said: "I was to deliver the gravel in the bunkers at the screen," and that he was to receive for it "sixty-five cents per yard in the bins at the machine." He also testified that he employed all of the plaintiffs in preparing the sand and gravel. There was evidence to the effect that the screening plant belonged to W. C. Betts. There was no evidence that either Powell or the canal company furnished it or had any interest in it. Betts testified that he had operated the same plant at other places, and that some of the plaintiffs had worked for him before in connection therewith.

Judgments by default were entered against the defendant W. C. Betts for the amounts due to the plaintiffs, the action was dismissed as to the defendant Powell, and a decree was entered establishing and foreclosing liens in favor of all of the plaintiffs, save one Burnett, upon the irrigating canal of the defendant canal company. From that decree, the defendant canal company prosecutes this appeal.

The respondents contend that W. C. Betts was a subcontractor, and as such, the statutory agent of the canal company in employing the laborers who screened the sand and gravel. The appellant insists that Betts was a materialman and had no part in the actual construction of the canal, and hence there was no basis in the facts for a statutory agency.

The statute under which these liens were claimed, Rem. &

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Bal. Code, § 1129 (P. C. 309 § 53), so far as pertinent, reads as follows:

"Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any . . . ditch, dyke, flume . . . or any other structure . . . has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter."

An analysis of this section, as it seems to us, clearly sustains the appellant's contention. The lien for labor is accorded for work performed upon the ditch or flume, and at the instance of the owner or his agent. No lien is accorded for labor performed in the preparation of materials being furnished by the materialman, and at the instance of the materialman. This seems plain from the language of the first clause of the section. All doubt, if there could be any, is removed by the next clause of the same section, which makes only the contractor, subcontractor, architect, builder, or person having charge of the construction, the agent of the owner for the purpose of establishing the lien. The statutory agency is confined to the persons named. A materialman is not one of them.

Betts employed all of the respondents. According to their own testimony, they performed labor for him alone. There was not a glimmer of evidence that the respondents did any work at the request of any one else. Neither of the respondents testified that he was employed by, or looked to either the canal company or to Powell for his pay. Neither Betts nor any of his employees had any part in the actual work of constructing the canal. Betts was clearly a materialman. *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083. He was not

the contractor nor a subcontractor, architect or builder, nor did he have charge of the construction of the canal or any part of it.

"A subcontractor is one who takes from the principal contractor a specific part of the work, and the term does not include laborers or materialmen. *Farmers' Loan & Trust Co. v. Canada & St. Louis R. Co.*, 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740." *Young Men's Christian Ass'n v. Gibson*, 58 Wash. 307, 105 Pac. 766.

Betts merely furnished the sand and gravel used in the work, just as some one else furnished the cement, and still another the steel. If he was a subcontractor, then every materialman would fall within that class, and the distinction manifestly intended by the statute would be obliterated. He was not a statutory agent of the owner by any construction of the statute, however liberal. To hold that he was, would be to legislate, not to construe.

"If one who furnishes the sashes, doors, and glass for a building is a subcontractor, every materialman would fall in that class, and such construction would nullify the plain terms of the statute. The argument that the contract to furnish the material is an entirety and that it is difficult to comply with the statute, is one that should be addressed to another department of the state government. We are not responsible for the wisdom or the expediency of the law." *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083.

See, also, *Monroe v. Clark*, 107 Me. 134, 77 Atl. 696, 30 L. R. A. (N. S.) 82. The statute makes, and preserves throughout, a distinction between materialmen and subcontractors. It accords a lien to both, but upon different conditions. The materialman must, within five days after the first delivery of materials, deliver or mail to the owner of the property a notice in writing that he is furnishing the materials. Laws of 1911, p. 376 (§ Rem. & Bal. Code, § 1133). It was testified and tacitly admitted that no such notice was delivered or mailed in this instance.

Even if it could be held that the laborers employed by

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Betts might be subrogated to his right of lien as a materialman because their labor had gone into the materials (a thing not decided because not before us), still, such a holding would not avail them here, since the specific condition for a lien in Betts' favor for the materials furnished was never performed. *Culbert v. Lindvall*, 73 Wash. 643, 132 Pac. 729. Conceding that the legislature intended to provide a lien for all laborers, it would still be manifest that, if these laborers could have had a lien, it could only be as against Betts and on his plant, under Rem. & Bal. Code, § 1149 (P. C. 309 § 117), which gives a lien to laborers employed by a manufacturer on the manufacturing plant in which they are employed. Whether Betts' plant was such a plant as would properly fall within that section, we do not here decide, since the lien here claimed is not asserted under that section. It is, however, the only section of all the lien statutes to which a plausible argument for a lien on anything in favor of these respondents could be addressed.

The respondents assert that the screening apparatus was placed at Powell's direction where it was most serviceable, relative to the balance of the work. No citation to the record in support of this statement is made, and a careful reading of the record fails to disclose any such testimony. In any event, that circumstance would be immaterial. The apparatus was doubtless located with a view to the convenience of all of the parties concerned.

The respondents further contend that, the trial court having found that Betts was a subcontractor, and the question involved being not one of law but of fact, this court is not at liberty to disturb that finding. This contention is erroneous for two reasons. In the first place, on undisputed evidence as to the facts, whether the lien arose or not was a question of law. In the second place, this is a trial *de novo*, in which the findings of the trial court, though entitled to weight, have no binding force upon us. *Johns v. Arizona Fire Ins. Co.*, 76 Wash. 349, 136 Pac. 120, and cases there cited. *Borde v.*

Kingsley, 76 Wash. 613, 136 Pac. 1172; *Lewis v. Dean*, 76 Wash. 596, 137 Pac. 841; *Dougherty v. Soll*, 70 Wash. 407, 126 Pac. 924. These decisions clearly recognize the correct rule that findings of the trial court in a case triable *de novo* will be sustained only when supported by a fair preponderance of the evidence. It is our duty in such a case to weigh the evidence. That is what a trial *de novo* means.

Respondents cite decisions from other jurisdictions to the effect that, in order to have a lien for labor, it is not necessary that the labor be performed on the premises where the improvements are actually made. This is, of course, true if the labor was performed directly for the owner, or for the principal contractor, or for his subcontractor, who has undertaken to perform some specific part of the work of actual construction. The cases cited go no further. In *Evans Marble Co. v. International Trust Co.*, 101 Md. 210, 60 Atl. 667, 109 Am. St. 568, a subcontractor, by contract with the principal contractor, agreed to carve, erect, place, and finish all the exterior marble work on a certain structure. The statute there under discussion gave a lien for labor only. The subcontractor who directed all of the work of preparing and placing the marble in the structure was accorded a lien for his labor. The right to a lien in favor of laborers employed by him was not involved nor discussed. In *Scannell v. Hub Brewing Co.*, 178 Mass. 288, 59 N. E. 628, it was merely held that a lien could be maintained for labor performed under an agreement with the property owner to furnish and erect brewery boilers set up in brick work, with all pipe connections, and also certain tank work. Part of the work was done at the petitioner's works in preparing the material. The lien was claimed by, and allowed to, the original contractors for preparing and setting up the boilers. As in the last case cited, no right of lien as in favor of the claimant's employees was either involved or discussed. In *Daley v. Legate*, 169 Mass. 257, 47 N. E. 1013, it was held that workmen were entitled to a lien for labor on materials which they knew were

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intended for use on a building which their employer had contracted to build, and which were, in fact, so used, though the work was done in the contractor's own yard. In *Webster v. Real Estate Imp. Co.*, 140 Mass. 526, 6 N. E. 71, it was held that a mechanics' lien for labor in hauling sand to be used in work upon a building could not be maintained. The statute apparently gave no lien to a materialman as such, hence, there could be no lien for hauling the sand, since the work was not connected with the actual building of the structure. This case, like the last one cited, so far as it has any bearing upon the question here presented, is contrary to the respondents' contention. In *Wilson v. Sleeper*, 131 Mass. 177, the laborer was employed by, and the labor was performed directly for, the principal contractor, and consisted in preparing finish for certain houses. Had the claimants in the case here involved been employed by the original contractor Powell, the case cited would be apposite. On the facts here, it is not. These decisions clearly sustain the position that, in order to maintain a lien for labor against the structure itself, the labor must either be performed directly for the owner, or for the original contractor, or for a subcontractor who has contracted to build some part of the actual structure.

Finally, we say that, since the statute clearly contemplates a distinction between subcontractors and materialmen, the line of distinction contemplated by the statute between these two must be definitely drawn somewhere, otherwise the owner of property would never know how to protect himself. He would never know when or where even to seek the information necessary to protect himself. He can reasonably be expected to know of a subcontract, and the work performed in carrying it out, because the work of the subcontractor, or some part of it, is performed upon the property, and in the actual construction of the improvement. It would be wholly unreasonable to expect him to go afield and investigate as to all labor performed by employees of materialmen furnishing the various materials used in the work, none of such labor being

connected with the actual work of construction, nor performed upon his premises. The statute must be liberally construed, but a liberal construction does not mean an unfair construction, even in the interest of a favored class.

The decree foreclosing the alleged liens is reversed, and the cause is remanded for dismissal as to the appellant canal company.

Crow, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[No. 11309. Department One. December 26, 1913.]

THE STATE OF WASHINGTON, *Respondent*, v.

ADAM JAKUBOWSKI, *Appellant*.¹

EMBEZZLEMENT—BY BAILEE OR PLEDGEE—CONTRACT OF BAILMENT. An agreement, whereby one went upon bonds to secure the payment of lost certificates of deposit, in consideration of which he was to hold the sums paid until such time as the bonds were released, is a contract of bailment, making the party a pledgee or trustee, within the meaning of Rem. & Bal. Code, § 2601, subd. 3, defining larceny by a bailee, pledgee, agent or trustee etc.

INDICTMENT AND INFORMATION—SUFFICIENCY—LANGUAGE OF STATUTE. An information charging the crime of larceny by a bailee, pledgee or trustee, substantially in the language of the statute, Rem. & Bal. Code, § 2601, is sufficient.

EMBEZZLEMENT—INSTRUCTIONS—FAILURE TO REDELIVER MONEY ON DEMAND. Upon an information for larceny by embezzlement by a bailee, pledgee or trustee, it is proper to instruct that, if the accused received money to hold for the complaining witness until the accused was released from liability on certain bonds, without any agreement that he should have the use of the money, and failed to redeliver it within a reasonable time after being notified that he was released from the bonds, if he was so released, his failure would constitute the offense of larceny as defined by Rem. & Bal. Code, § 2601, subd. 3.

SAME—EVIDENCE—SUFFICIENCY. Upon a prosecution for larceny by embezzlement by a bailee, pledgee or trustee, the evidence sustains a conviction, making a case for the jury, notwithstanding a

¹Reported in 137 Pac. 448.

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sharp conflict in the evidence, where it appeared from the evidence of the state that the prosecuting witness paid the accused \$5 for going on bonds to secure the payment of lost certificates of deposit, the money was delivered to the accused, and a written contract entered into, wherein he agreed to return the money to the prosecuting witness on the release of the bonds, the bonds were released, a civil action to recover the money was prosecuted to judgment, and the accused at first refused to pay the judgment, and thereafter attempted to arrange for payment by installments.

CRIMINAL LAW—APPEAL—REVIEW—VERDICT. The supreme court will not disturb a conviction for insufficiency of the evidence, where there was evidence to support the verdict.

CRIMINAL LAW — APPEAL — RECORD — MISCONDUCT OF COUNSEL—STATEMENT OF FACTS—AFFIDAVITS. Error cannot be assigned upon improper remarks by counsel in argument to the jury when they are not preserved in the record and certified to by the judge as actually having been made; and they cannot be shown by mere claims of counsel and exceptions allowed by the court, or by affidavits.

CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. In a prosecution for larceny by embezzlement, in which it appeared that a judgment had been obtained against the accused in a civil action, which judgment had not been paid, it is not *per se* objectionable for the prosecuting attorney to argue to the jury that the presence of the accused was evidence that every step had been taken to get the money from him.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 23, 1912, upon a trial and conviction of grand larceny. Affirmed.

Jay C. Allen, for appellant.

John F. Murphy, Crawford E. White, and Reah M. Whitehead, for respondent.

ELLIS, J.—The defendant was charged with the crime of grand larceny. The information was based upon the provisions of Rem. & Bal. Code, § 2601 (P. C. 135 § 695), and alleged, in substance, that, on June 15, 1912, the defendant, being authorized by agreement to hold \$300 belonging to one Jan Majeuski, as bailee and trustee, “did then and there willfully, unlawfully, fraudulently and feloniously withhold and

appropriate the same to his own use, with intent to deprive and defraud the said Jan Majeuski thereof."

The substantial facts, as developed in the state's evidence, were as follows: The prosecuting witness, Majeuski, in December, 1910, claimed to have lost three certificates of deposit for \$100 each, one issued to him by the Seattle National Bank of Seattle, and two by the First National Bank of Seattle. The banks refused to pay him the \$300 represented by these certificates until he had furnished them indemnity bonds in double the amount deposited, executed by him and another acceptable bondsman. Majeuski was a Pole, and had lived in this country only a few years. He was directed to the defendant, a fellow countryman, as one who might be willing to sign the bonds. The defendant finally agreed to sign the bonds, and went to the banks with Majeuski, where his financial standing was investigated and found satisfactory, and on December 16 and 17, 1910, the bonds were executed by Majeuski and the defendant and delivered to the banks. The money represented by the lost certificates was paid by the banks to Majeuski, who turned it over to the defendant. The defendant, accompanied by Majeuski, took the money to another bank and deposited it in the defendant's name. Majeuski testified that, at the defendant's direction, he remained outside of the latter bank when the deposit was made, and supposed that the defendant was depositing the money to his (Majeuski's) credit. He further testified that he paid the defendant five dollars for signing the bonds, and that the defendant told him that he (the defendant) would return the money in two or three months. On December 19, the two men went to the office of an attorney, Robert Welch, for the purpose of having some writing drawn up showing the terms upon which the defendant was to hold the money. Majeuski, who claimed to have little understanding of English, testified through an interpreter. He claimed that the attorney first prepared one paper, which was destroyed, and then prepared another in duplicate, which was executed by Majeuski and the

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defendant, one of the duplicates being delivered to each of them. The latter paper was introduced in evidence, and reads as follows:

"Seattle, Washington, December 19th, 1910.

"Whereas John Majeski has lost one certificate of deposit for the sum of two hundred dollars on the First National Bank of Seattle and a certificate for the sum of one hundred dollars on the Seattle National Bank of Seattle, and whereas Adam Jakubowski has this day given to the said banks his bond for the payment of the said sums of money, Now therefore the said Adam Jakubowski is to have and to hold the said sum of money to wit: three hundred dollars until such a time when the said banks release the said Adam Jakubowski on said bonds and when said bonds are so released then the said money, to wit: the sum of three hundred dollars is to be delivered over and unto the said John Majeski.

Witness:

Robert Welch.

Jan Majeuski

Adam Jakubowski."

In January, 1911, Majeuski asked the defendant for some of the money, and the defendant refused to give it to him, threatening violence if he persisted in demanding it. On January 25, 1911, Majeuski brought a civil action against the defendant, demanding the \$300 and costs. The complaint alleged fraud on the part of the defendant, and, in addition to the money demand, asked for a cancellation of the above agreement. In this civil action an amended complaint was filed, on September 30, 1911, alleging that the bonds given to the banks had been cancelled, and again asked for judgment for the \$300 and costs. At this time, one of the bonds had not been cancelled, and it was admitted on the present trial that one of the bonds was not cancelled until the day before the trial of the civil action. The attorney for Majeuski in the civil action testified that this was through an oversight, due to the fact that two bonds were given to one bank and the third to another, and that he, supposing that there were only two bonds, overlooked the fact that one of the two bonds given to one of the banks was not released; but that, on the

release of the one bond, it was the intention to release the defendant on both the bonds and on all liability to the bank.

The civil action was tried in May, 1912, and resulted in a verdict and judgment for the plaintiff for \$288, being the \$300 less the costs, which were awarded to the defendant because one of the bonds had not been released when the action was instituted. The attorney for Majeuski in the civil action testified that the defendant at first absolutely refused to pay this judgment, stating that he would never pay it; that afterwards, when execution was issued, he offered to pay the judgment in installments of \$50 each at intervals of sixty days, which arrangement the attorney refused to consider, and that no part of the judgment has been paid. Shortly after this, the information in the present case was filed.

The evidence on behalf of the defendant was directed to the support of his contention that he received nothing for going on the bonds with the bank, but that he agreed to go on these bonds in consideration that he receive the money as a loan for a period of six years at six per cent interest, that being the period for which he would be liable on the bonds. The defendant testified that he met the prosecuting witness in a certain saloon; that the prosecuting witness informed him of his predicament and requested the defendant to go upon his bonds in order to secure the money from the banks. As to what was verbally agreed to, he testified:

"I says I am going to see a lawyer and fix a paper. Of course I don't want to sign your bond for \$600 at the bank if I have got no security. I says I will tell you the bank will never release my bond for six years; you hear that? He says yes. I says if I sign your surety bond they will give it to you, but I am the security. He says you give me that money just the same as the bank. If the bank after six years releases you, you pay my money back, and at any time if I want some five or ten dollars will you give it to me? I says yes, I will do that. I says I will tell you, Majeuski, if I take that money for six years I will use it and pay you six per cent interest. He says all right, you give me that; it is better

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than for the bank because the bank will never pay me that money. I says all right, I will do that. And I went with him to the bank and to the lawyer and fixed that agreement."

He testified that, on going to the attorney's office, he first saw the attorney's stenographer and asked him to make a promissory note; that shortly afterward Mr. Welch, the attorney, came in and made out a promissory note for six years, but afterward explained that if the defendant signed the promissory note and Majeuski should transfer it to some third person, the defendant would be subject to a double liability by reason of his note and his bonds with the bank; that the note was then torn up and the attorney drew up the foregoing agreement, which was executed by the prosecuting witness and the defendant in duplicate, one of the agreements being delivered to each. He further testified that Majeuski was present when the defendant deposited the money in the bank in his own name, and that the agreement was drawn up and signed in the attorney's office before the bonds were signed and the money secured from the banks. In this he is contradicted both by the testimony of the prosecuting witness and by the dates of the papers themselves. He also testified that Majeuski paid him nothing for signing the bonds. He admitted that he has paid no part of the money, stating that he is unable to do so, but that he has made many unavailing efforts, which he related in detail, to secure a loan with which to pay the money. One Kalinowski testified that, in December, 1910, in a conversation in a saloon, he heard the prosecuting witness tell the defendant he could use the money for six years until the banks released the bonds, the defendant to pay six per cent a year for its use. As to what occurred in the attorney's office, the stenographer testified that, some time in December, 1910, Majeuski and the defendant came into Mr. Welch's office; that Majeuski conversed in English, which he could speak, and seemed to understand very well; that the defendant told the witness that Majeuski had agreed to let him have the money for five or six years, and that

Majeuski explained that he was willing to do so because the defendant had gone on his bonds; that Mr. Welch came in and explained to the defendant the danger of a double liability in case he gave a note while the bonds were still in the hands of the bank, and that the agreement above mentioned was then drawn up in duplicate.

Robert Welch, the attorney, testified that, when he came to his office one morning, Majeuski and the defendant were there with the stenographer; that he took them into his private room, where Majeuski explained that he had lost the certificates; that he was going to leave town and wanted the defendant to have the money and take care of it for him; that the witness made out a promissory note for \$300, running for six years, explaining to the parties that, under the statute of limitations, the defendant would be liable on the bonds for six years; that he then advised the defendant not to sign the note, and explained to him the dangers of a double liability in case the certificates were presented to the bank and the note endorsed to some third person; that the note was then torn up, and that the witness dictated the agreement as above quoted. He further testified that Majeuski stated that he wanted the defendant to take care of the money for him, as he was afraid to leave it in the bank, and that Jakubowski could use the money for his own personal use, as he had loaned the money and wanted the defendant to have it, but that he could not recall whether anything was said about interest or not; that he dictated the agreement according to his understanding from their conversation, in which they both said the defendant was to keep the money, and that he thought it would suit their purposes.

There was also introduced on behalf of the defendant an answer, prepared for filing in the civil action, in which the matters as now claimed by the defendant were set up as a defense in the civil action, that answer having been prepared before the filing of the information in this action. The answer, though prepared, was never filed. At the close of the

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evidence on behalf of the state, the defendant challenged its sufficiency and moved for a dismissal, which was denied. The jury found the defendant guilty. Motions for a new trial and in arrest of judgment were overruled. Judgment and sentence were pronounced and the defendant appealed.

The appellant assigns as error the overruling of the demurrer to the information, the overruling of the defendant's challenge to the sufficiency of the evidence, the giving of a certain instruction to the jury, the overruling of the motion in arrest of judgment, and the denial of a new trial. Under these assignments, the appellant presents and argues three questions: (1) Assuming the facts as claimed by the state to be true, did they constitute larceny under the statute, and did the court err in so instructing the jury? (2) Was the evidence sufficient to withstand the motion challenging the sufficiency of the evidence, the motion in arrest of judgment, and the motion for a new trial? (3) Should a new trial have been granted because of misconduct of counsel for the state?

I. If the written agreement spoke the intention of the parties, it clearly constituted a contract of bailment by pledge and made the appellant a pledgee and trustee for the prosecuting witness. As to whether it did, in fact, speak the intention of the parties, the evidence was, as we have seen, sharply conflicting, but this phase of the argument proceeds upon the assumption that the facts, as claimed by the state, were true. The statute, Rem. & Bal. Code, § 2601 (P. C. 185 § 695), subdivision three, reads as follows:

"Every person who, with intent to deprive or defraud the owner thereof . . . (3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian or officer of any person, estate, association or corporation, or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person en-

titled thereto . . . steals such property and shall be guilty of larceny."

The information charged that the defendant was authorized by agreement to take and hold possession of the money as servant, agent, bailee and trustee for Majeuski, and willfully, unlawfully, fraudulently and feloniously withheld and appropriated it to his own use with intent to deprive and defraud Majeuski thereof. No demurrer to the information appears in the record, but, in any event, the information, which charged the crime practically in the language of the statute, was sufficient. *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *State v. Whiteman*, 9 Wash. 402, 37 Pac. 659; *State v. Whitworth*, 30 Wash. 47, 70 Pac. 254; *State v. Bogardus*, 36 Wash. 297, 78 Pac. 942.

The court instructed the jury:

"If, however, you should find that the understanding and agreement between the defendant and the complaining witness was that the defendant should receive the said sum of \$300 and hold it to be redelivered to the complaining witness, Jan Majeuski, upon the release of the defendant from said bonds and that there was no agreement or understanding between the said defendant and the said Jan Majeuski that the defendant should have the use of said money, then it would be the duty of the defendant to re-deliver said money to the said complaining witness within a reasonable time after being informed that the defendant was released from said bonds, if you do find that he was so released, and failure so to do, if you should find against the defendant upon the other issues in the case, would constitute the offense of larceny."

We find no error in this instruction. If, as assumed, the facts as to the agreement and intention of the parties were as claimed by the state, the instruction clearly stated the law applicable thereto.

II. At the close of the state's case in chief, there was no evidence tending to show that the written agreement did not speak the intention of the parties. The testimony of the prosecuting witness that he paid the appellant five dollars for

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going on his bonds with the banks tended, in some degree, to prove that it did speak that intention. The institution of the civil action before the bonds had all been released, if unexplained, might have tended to show the contrary, but the attorney who represented the plaintiff in the civil action had explained that this was through a mere oversight. There was clear evidence that the appellant, after the bonds were all released and the claim reduced to judgment, refused to return the money. There was then no evidence that he claimed that the transaction constituted a loan. His reception of the money, the written agreement to return it on his release from the bonds, and his refusal to do so, constituted competent evidence tending to establish every element of the crime charged. Its weight was for the jury, as was its credibility. The testimony that the defendant at first said he would never pay the money, but afterwards endeavored to make an arrangement to pay it in installments, did not negative the criminal intent raised by the failure to pay it. On the contrary, it tended to prove that the appellant had appropriated the money to his own use, which, if he held the money as pledgee or bailee, was of the very essence of the crime. The motion challenging the sufficiency of the evidence at the close of the state's case was properly overruled.

At the close of all of the evidence, the situation remained unchanged, except that a sharp conflict had been raised as to whether the written agreement spoke the actual intention of the parties. In our statement of the case, we have detailed every salient feature of the evidence, and while it appears to this court as persuasively negating a criminal intention on the appellant's part, its weight and the credibility of the appellant and his witnesses were for the jury. As we have seen, there was adduced by the state competent evidence tending to prove every element of the crime as charged. The trial court denied the appellant's motion in arrest of judgment and refused to grant a new trial upon conflicting evidence. In such a case, whatever our own opinion as to the weight or pre-

ponderance of the evidence, we cannot reverse the action of both the trial court and the jury. To do so would be to invade the province of both. It would be to substitute our judgment for that of the jury as to a question of fact upon conflicting evidence, and our discretion for that reposed by statute in the trial court.

"This court has heretofore announced that it will not disturb verdicts of this character, on the ground of alleged insufficiency of evidence, where there is evidence to support the verdict, although it may not be of the most convincing kind. Both the jury and the trial court have the opportunity to hear and see the several witnesses, to note their manner as to apparent candor and truthfulness, and are therefore better prepared to pass upon the credibility of their testimony than is this court with only a bare record of the words spoken by the witnesses. The weight of the evidence having been first passed upon by the jury, and next by the trial judge in denying the motion for new trial, we shall not undertake to say that they were wrong." *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036.

See, also, *State v. Pacific American Fisheries*, 73 Wash. 37, 131 Pac. 452; *State v. Bailey*, 67 Wash. 336, 121 Pac. 821; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 867; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Bailey*, 31 Wash. 89, 71 Pac. 715. The same general rule prevails in other jurisdictions. 12 Cyc. 906, 907, 908; *Miller v. Territory*, 9 Ariz. 123, 80 Pac. 321; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *People v. Williams*, 133 Cal. 165, 65 Pac. 323. The crucial question upon the evidence was that of the good or bad faith of the appellant in appropriating the money to his own use. This was clearly a question for the jury. *State v. Buchanan*, 43 Wash. 400, 86 Pac. 650; *State v. Lewis*, 31 Wash. 75, 71 Pac. 778; *State v. Maines*, 26 Wash. 160, 66 Pac. 431.

III. It is earnestly claimed that a new trial should have been granted because of alleged improper statements of counsel for the state in his closing argument. No part of this

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argument is presented in the record. The only reference to it in the record of the trial is found in the following objection interposed by counsel for the appellant at the close of the argument:

"Mr. Allen: If you honor please, counsel for the state has just stated to the jury in his closing remarks that the fact that this defendant is now before them is evidence to them that every step has been taken to get this money from him, and for that reason they should determine that the defendant would not pay this money. I except to this statement and I ask the judge to charge the jury now in response to this statement, that the fact that the defendant is here is no evidence at all whether he is guilty or innocent. He is presumed to be innocent until proven guilty, and I ask the judge to so charge the jury.

"The Court: The stenographer will take down the exception."

The same thing is, in substance, repeated in an affidavit of counsel for the appellant in support of the motion for a new trial. This objection is unavailing for two reasons. In the first place, the alleged objectionable remarks were made in the presence of the court. They could have been, and should have been, preserved in the record in context, and certified by the trial judge as actually having been made. As the record stands, the trial judge merely certified that counsel for appellant claimed that they were made, and objected thereto. The recital of matters occurring in the presence of the court in the affidavit submitted on motion for a new trial was, as we have repeatedly held, an insufficient preservation of the record for the purposes of review.

"As to the objection raised by the appellant to the remarks alleged to have been made by the counsel of the prosecuting witness in his closing argument to the jury, this court is unable to determine from the record that such remarks were made. It is true there is an affidavit on file to that effect, and this affidavit is made a part of the statement of facts, but the certificate of the court to the statement of facts shows nothing more than that the affidavit was made;

it does not attempt to settle the truthfulness or untruthfulness of the matters set forth in the affidavit." *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20.

See, also, *Maryland Casualty Co. v. Seattle Elec. Co.*, 75 Wash. 480, 134 Pac. 1097; *Loy v. Northern Pac. R. Co.*, ante p. 25, 137 Pac. 446. The same is true of counsel's objection at the close of the argument. In a case closely analogous, we said:

"Error is assigned on a statement made by the prosecuting attorney in his argument to the jury, but the only reference to such statement in the record is found in the following objection, interposed by counsel for appellant, at the close of the testimony: 'I wish to object to the statement by the prosecutor that the very fact that this case must go to the jury is a guarantee of the legal sufficiency of the evidence to convict this man.' The record does not show that any such statement was made by the prosecutor, or that the court's attention was otherwise directed to it if made. There is, therefore, no ruling of the court before us for review." *State v. Poyner*, 57 Wash. 489, 107 Pac. 181.

See, also, *Lane v. State*, 59 Tex. Cr. 595, 129 S. W. 353; *State v. Gruber*, 19 Idaho 692, 115 Pac. 1; *Holland v. State*, 61 Tex. 201, 134 S. W. 693; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *State v. Levy*, 126 Mo. 554, 29 S. W. 703.

In the second place, the language attributed to counsel for the respondent was not objectionable *per se*. The context, if we had it before us, might show that the argument was entirely legitimate. If the jury believed that the written agreement was the agreement upon which the minds of the parties met when the money was turned over to the defendant, then the jury was at liberty to find that the contract was one of bailment. It was, therefore, legitimate argument to state that if he, knowing that he had no right to use the money, had so disabled himself from returning it that he could not pay it and did not pay the judgment rendered for the money in the civil action, that would be strong evidence that he had,

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with fraudulent intent, appropriated the money to his own use.

Upon the whole record, we find nothing which would warrant a reversal. The judgment is affirmed.

Crow, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[Nos. 11491-11493. Department Two. December 26, 1913.]

In re QUEEN ANNE BOULEVARD.

THE CITY OF SEATTLE, *Respondent*, v. F. W. WALD *et al.*,
Appellants.¹

EMINENT DOMAIN—DAMAGES—SPECIAL BENEFITS—OFFSET. In eminent domain proceedings by a city, in which the damages are to be paid from the general fund, benefits may be offset against the damages, under the express provisions of Rem. & Bal. Code, § 7782.

SAME—BENEFITS—OFFSET. Benefits may be offset against the damages on condemnation of property by a city at the expense of the general fund, without violating any constitutional rights of the property owner.

SAME—BENEFITS—OFFSET—EVIDENCE—ADMISSIBILITY. Benefits may be offset against the damages on condemnation of property by a city at the expense of the general fund, although the benefits resulted from improvements to follow which were not provided for in the condemnation ordinance, where competent evidence established the nature and extent of such improvements with reasonable certainty, and that they would be completed within a reasonable time, and that the two proceedings constituted one united object.

SAME—ADJUDICATION—CONCLUSIVENESS—MATTERS CONCLUDED. The condemnation of land for a boulevard, is not an adjudication affecting the right of the city to offset benefits in subsequent condemnation proceedings to acquire additional rights incident to the improvement of the boulevard.

SAME—BENEFITS—OFFSET—APPORTIONMENT. In offsetting benefits against damages in eminent domain proceedings by a city, only the special benefits peculiar to particular property can be considered, and there can be no question as to the apportionment of the benefits between separate properties.

¹Reported in 137 Pac. 435.

SAME—DAMAGES—BENEFITS—OFFSET—EVIDENCE—ADMISSIBILITY. Upon the question of the amount of benefits to be offset against the damages in eminent domain proceedings by a city, it is competent to show the amounts which would have been chargeable against the property upon a special assessment plan for the same improvement.

SAME—BENEFITS—OFFSET—SEPARATE TRACTS. Benefits to one lot cannot be offset against the damages due to the same owner for injury to a contiguous lot; hence it is error to treat two lots as one tract of land, where they were unoccupied and not used in common, and each was of sufficient size to admit of separate use; whether their use and situation made them in fact one parcel, being a question for the jury, unless there is no room for different opinions.

Appeals by defendants from judgments of the superior court for King county, Mackintosh, J., entered May 5, 1918, upon the verdicts of a jury, awarding damages in condemnation proceedings. Reversed as to defendants Wald; affirmed as to the other defendants.

Moore, Wardall, Wardall & Martin, for appellant Wald.

L. H. Wheeler, for appellants Hopkins and Rushton.

N. S. Peterson, for appellants Wheeler.

James E. Bradford, Howard A. Hanson, and Geo. A. Meagher, for respondent.

PARKER, J.—These are eminent domain proceedings, instituted by the city of Seattle, as a single proceeding, in the superior court for King county, whereby the city seeks to acquire, as against numerous owners of property abutting upon Queen Anne Boulevard, certain rights necessary for the city to possess in order to improve that boulevard in accordance with the recent officially established and reestablished grades thereof, along several miles of its course, and to change the use of the boulevard from ordinary street to park drive and boulevard uses. The defendants Walds, Hopkins, Wheelers and Rushtons, separate owners of lots and tracts abutting upon the boulevard, were awarded damages by verdicts and judgments rendered thereon and, deeming themselves aggrieved thereby, have appealed to this court.

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Separate trials were had in the superior court, but before the same jury, to determine the amount of damages to be awarded to appellants because of injury resulting to their respective properties. While the rights of these appellants are before us for determination upon four separate appeals, each upon its own record and statement of facts, except as to a number of exhibits introduced in evidence which are common to all, the appeals have so much in common, both as to the controlling facts as well as in the contentions made thereon, that we have concluded to dispose of all of them in this one opinion, and thereby save much useless repetition, both in statement of the somewhat involved facts and discussion of contentions made by counsel for the respective appellants.

Queen Anne Boulevard is several miles in length, running for the most part through one of the best residence districts of the city of Seattle, on and around Queen Anne Hill. The boulevard was laid out and, so far as was then necessary, the land therefor was acquired by eminent domain proceedings, prosecuted in pursuance of ordinance No. 16,790, mentioned in ordinance No. 26,253, in pursuance of which these eminent domain proceedings are prosecuted. The boulevard follows, in the larger part of its course, streets which had theretofore been platted and dedicated. Eminent domain proceedings were resorted to in its laying out for the purpose of acquiring land in addition to the dedicated streets which it followed. The matter of the change of the established grade of those streets, the establishment of original grades where necessary, and the physical improvement of the boulevard, which are the purposes to which these eminent domain proceedings look, were not then involved. Ordinance No. 16,790 provided only for the acquisition of additional land for the laying out of the boulevard, and not for its physical improvement. There are some recitals in that ordinance which suggest an intention on the part of the city to acquire rights other than the mere acquisition of the necessary additional land therein described for laying out the boulevard as contemplated, but

such rights are not described in that ordinance with certainty. Evidently, in view of this fact, the city officers considered the ordinance as only authorizing the condemnation of the necessary additional land, and proceeded accordingly. The judgments rendered in those eminent domain proceedings, which are before us, make it plain that nothing more than this additional land was then acquired by the city. The expense incidental to the acquiring of the additional land for the laying out of the boulevard, as contemplated by ordinance No. 16,790, was paid by special assessments made by eminent domain commissioners against the property specially benefited thereby. In this manner, Queen Anne Boulevard came into existence so far only as its mere laying out and the acquisition of the land therefor is concerned, in the year 1909.

In January, 1910, the board of park commissioners of the city of Seattle passed a resolution looking to the acquiring of jurisdiction over Queen Anne Boulevard as a park driveway, providing, so far as we need here notice its contents, as follows:

"Be it resolved by the board of park commissioners as follows:

"Section 1: That in case the city council of the city of Seattle shall by proper ordinance transfer, set aside and place under the jurisdiction of the board of park commissioners, the property described and mentioned herein for parkway and boulevard purposes, it is the intention of the board of park commissioners, and said board of park commissioners of the city of Seattle, does hereby bind and pledge itself to improve the same by grading, parking and macadamizing and in no other way improving the same, from moneys under its control and jurisdiction and without any cost or expense for such improvement being assessed against any property abutting upon, contiguous or adjacent to the property herein described." (Here follows a description of the land covered by the boulevard.)

Thereafter, in January, 1911, looking to the permanent physical improvement of the boulevard, there was passed and approved by the city council and mayor ordinance No. 26,-

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253, providing for the acquisition of the rights sought to be acquired by these eminent domain proceedings, which ordinance, so far as we need here notice its provisions, reads as follows:

"Whereas, public necessity and convenience demand that said Queen Anne Boulevard be graded and regraded in conformity with the grades established herein, and that the use of said boulevard be changed from commercial to park, drive and boulevard uses; now, therefore,

"Be it ordained by the City of Seattle, as follows:

"Section 1. That the curb grades of Queen Anne Boulevard, as established by ordinance No. 16,790 of the city of Seattle, be and the same are hereby changed and established at the following elevations above city datum, to wit: [Here follow specified grades of the boulevard along its entire course to be improved.]

"That in the construction of the slopes for cuts and fills upon the property abutting upon said boulevard and approaches thereto, in conformity with such established grades, each cut shall be carried back into and extended upon the abutting real property one (1) foot for each foot in depth of cut, and each fill shall be carried back and extended upon the abutting real property one and one-half ($1\frac{1}{2}$) feet for each foot of elevation of fill.

"Section 2. That the use of Queen Anne Boulevard, as established by ordinance No. 16,790 of the city of Seattle, be and the same is hereby changed from commercial to park, drive and boulevard uses.

"Section 3. That all lands, rights, privileges and other property necessary to be taken, used or damaged in the grading and regrading of said Queen Anne Boulevard, as established by ordinance No. 16,790, and approaches thereto, all in the city of Seattle, in conformity with the grades established in section one hereof, and in the construction of the necessary slopes for cuts and fills upon the real property abutting upon said boulevard and approaches thereto, are hereby condemned to the public use for such purposes; and all lands, rights, privileges and other property necessary to be taken, used or damaged by the change from commercial to park, drive and boulevard uses, are hereby condemned to the public use for such purpose. Said lands, rights, privileges and other

property are to be taken, used and damaged only after just compensation has been made or paid into court for the owner in the manner provided by law.

"Section 4. That the cost of the property and property rights necessary to be condemned, appropriated, taken and damaged in order to carry out the provisions of this ordinance, together with the cost of the necessary condemnation proceedings, shall be paid from the general fund."

Thereafter, in February, 1911, there was passed and approved by the city council and mayor ordinance No. 26,840, manifestly in response to the request and action taken by the board of park commissioners as evidenced by its resolution above quoted, which ordinance, so far as we need here notice its provisions, reads as follows:

"Whereas, heretofore, the board of park commissioners have in writing designated Queen Anne Boulevard as laid out, widened, extended and established under ordinance No. 16,790 of the city of Seattle, as property to be set aside and transferred to the board of park commissioners, for park, parkway and boulevard purposes; now therefore,

"Be it ordained by the city of Seattle as follows:

"Section 1. That all of Queen Anne Boulevard, as widened, extended, laid out and established by ordinance No. 16,790 of the city of Seattle, including street intersections . . . be, and the same is hereby set aside for park, parkway and boulevard purposes, and the control and jurisdiction thereof transferred to the board of park commissioners subject to the provisions of section 2 hereof.

"Section 2. That nothing herein contained shall be deemed or construed to divest the city council of jurisdiction and control, and the city council hereby expressly reserves unto itself full and complete jurisdiction and control of all streets, avenues and highways herein transferred for the purpose of making any and all local improvement upon, on or under the same, except for grading, regrading, paving and parking and for creating local improvement district therefor."

The establishment of the grades specified in ordinance No. 26,258 authorizing these eminent domain proceedings meant the change of previously established grades upon portions of Queen Anne Boulevard, and the establishment of original

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grades upon other portions thereof. Whether that ordinance constituted the changing of a previously established grade on the portion of the boulevard in front of appellants Hopkins' and Rushtons' properties, is one of the questions to be noticed later. After the passage of these ordinances and the adoption of the resolution of the board of park commissioners, the physical improvement of the boulevard, which was commenced and carried on by the board of park commissioners in pursuance of the scheme contemplated by these ordinances and this resolution, had proceeded to the extent that the boulevard was graded in front of appellants' properties, and the improvement upon some other portions of the boulevard had proceeded to the extent that its surface was paved, at the time the trials occurred in these eminent domain proceedings, which was in December, 1911, resulting in verdicts and judgments from which these appeals are taken. Other facts will be noticed as may become necessary in our discussion of the several contentions made by counsel.

Counsel for the city introduced evidence at the trials upon the theory that, since the expenses incurred by the city in acquiring the rights here sought as against appellants were not to be paid for by special assessments against benefited property, but were to be assumed and paid by the city from its general fund, there should be offset against appellants' damages any special benefits resulting to their property from the proposed improvement. Counsel for appellants apparently do not seriously contend against the right of the city, in eminent domain proceedings of this nature, speaking generally, to offset benefits against damages when such damages are not to be paid for by special assessments. Indeed, there would seem to be no room for such a contention, in the light of the express provisions of Rem. & Bal. Code, § 7782 (P. C. 171 § 59), reading as follows:

"When such ordinance does not provide for any assessment in whole or in part on property specially benefited, the com-

pensation found for land or property taken or damaged shall be ascertained over and above any local or special benefits from the proposed improvement."

Our former decisions also render it plain that this may be done in an eminent domain proceeding prosecuted by a municipal corporation without violating any constitutional right of the property owner. *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Lincoln County v. Brock*, 37 Wash. 14, 79 Pac. 477; *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261; *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

Counsel for appellants do insist, however, that the trial court erred in permitting certain evidence to be introduced by the city, bearing upon the question of benefits. The claimed objectionable evidence introduced on behalf of the city consisted of the resolution of the board of park commissioners and ordinance No. 26,340, above quoted from, pledging the construction of the physical improvement of the boulevard without the levying of any special assessment upon the property benefited to pay therefor; evidence of the nature, extent and value of the proposed improvement; evidence of the present progress made in the construction of the proposed improvement; evidence of the amount of special benefits flowing therefrom to appellants' property; and evidence of the amounts which would be chargeable against their respective properties as special assessments to pay for the proposed improvement if the same were constructed upon the local improvement and assessment plan.

It is contended that this evidence was erroneously admitted, because the proposed improvement was not specifically provided for and described in ordinance No. 26,253, authorizing the prosecution of these eminent domain proceedings. We do not think that the exact nature and extent of the improvement which the city and board of park commissioners contemplated was to follow the acquisition by the city of the rights here sought was necessary to be made in that ordinance in order to entitle the city to have the special benefits flowing there-

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from to abutting property offset against damages resulting to such property from slopes, fills, change of grade and change of use of the boulevard. If, upon the trial of the question of damages resulting from these causes to abutting property, the city, by competent evidence, made the nature and extent of the proposed improvement when completed to appear with reasonable certainty, and that such improvement would be completed within a reasonable time following the acquisition of the rights here sought, all of which we think the city did make appear with reasonable certainty by competent evidence, it seems to us that special benefits flowing from such improvement to the abutting property may be offset against the damages resulting thereto from these causes. Not only did the city's evidence show with reasonable certainty the extent, nature and value of the proposed improvement and that it would be completed within a reasonable time following the acquisition of the rights here sought, but it also showed, by competent evidence, we think, that these eminent domain proceedings, together with the proposed physical improvement of the boulevard by grading and paving, in accordance with the grades established by ordinance No. 26,253, constituted one united project, so that it may be said that the benefits flowing to the damaged property resulted from the very improvements contemplated by the city to follow the acquisition of the rights here sought.

Some contention is made by counsel for appellants that special benefits cannot be lawfully offset against damages in these proceedings, because, in the prior eminent domain proceedings under ordinance No. 17,690 by which additional land was acquired for the laying out of the boulevard, benefits were charged against abutting property, including property of appellants, by special assessments to pay for the land so acquired. We have already noticed that nothing was then acquired by the city save the necessary additional land to lay out the boulevard. Of course, no benefits were offset against damages in those proceedings, since compensation for the land

taken was there paid for by special assessments; and it is plain that these special assessments were levied upon specially benefited property to pay for nothing but the additional land so acquired. Manifestly, no special benefits were considered in making those assessments save the benefits flowing from the mere acquisition of the additional land and the laying out of the boulevard. The physical improvement of the boulevard then remained a matter to be provided for in the future. The city could have thereafter lawfully proceeded with the physical improvement of the boulevard upon the local improvement and assessment plan, without its power in that regard being in the least impaired by the previous assessment levied to pay for the mere acquisition of the additional land. *Martenis v. Tacoma*, 66 Wash. 92, 118 Pac. 882. This being the law, we think it follows that the right of the city is not curtailed in having such benefits offset in condemnation proceedings necessary to the acquisition of additional rights incident to the physical improvement of the boulevard. Another thought worthy of note in this connection is that the city is prosecuting these condemnation proceedings, and appellants are resisting them, upon the theory that the city has not heretofore acquired the rights which it here seeks. That being true, it is difficult to see how there has ever been a previous adjudication upon either the question of these damages or of the benefits which will flow from the improvement being made without expense to appellants as a result of the acquisition of these rights. If this contention of appellants be regarded as sound, it would seem to necessarily follow that neither the question of damages or benefits need be tried in these proceedings. We conclude that the former assessment of benefits to pay for the mere acquisition of the land is no bar to the offsetting of benefits in these proceedings.

Some contention is made by counsel for appellants, rested upon what they conceive to be an analogy existing between the offsetting of benefits against damages as in these proceedings and the charging of the expense of the improvement

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against specially benefited property by special assessment. The argument is, in substance, that, in the offsetting of benefits—that is, the considering of the damages and the benefits as to each particular tract or parcel of land aside from all others—there is a failure to equalize the benefits flowing to abutting property from the proposed improvement, and thus there is a failure to comply with one of the principles upon which special assessments are chargeable. It is true that the authorities do seem to recognize, in a measure, an analogy existing between the offsetting of benefits in an eminent domain proceeding and special assessments. 1 Page & Jones, *Taxation by Assessment*, § 62. It seems to us, however, that as the question is here involved, this being a pure eminent domain proceeding the purpose of which is the ultimate ascertaining of the net damages resulting to the property of appellants and others separately, it not being sought to impose any charge whatsoever upon appellants' property, the analogy invoked goes no further than to require the offsetting of benefits to be limited to special benefits; and that there is not thereby drawn into the case any question of apportionment of charge for such benefits between separate properties. In *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794, Justice Scott, speaking for the court, observed:

"It is generally held that only such benefits as are special and peculiar to the particular property can be taken into consideration. But the laying out or widening of a street may be a special benefit to the property abutting thereon, and this benefit may be offset against the damages to the owner whose land is taken therefor, although parties upon the opposite side of the street are similarly benefited and are not chargeable therewith, for the reason that none of their lands were appropriated and no damages were claimed by them. *Hillbourne v. Suffolk*, 120 Mass. 393; *Donovan v. Springfield*, 125 Mass. 371; *Cross v. Plymouth*, 125 Mass. 557; *Abbott v. Cottage City*, 143 Mass. 521 (10 N. E. Rep. 325); *Trosper v. Commissioners*, 27 Kan. 391; *Allegheny v. Black*, 99 Pa. St. 152."

This view is reaffirmed in *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261, where it is also pointed out that

benefits are not rendered general so as to prevent their deduction from damages, as counsel seems to contend, merely because other property in the neighborhood of the improvement may also receive benefits of like nature. We are of the opinion that there is not here involved any question of apportioning benefits between different properties, and that the city may have all the special benefits resulting from the proposed improvement to any particular lot or parcel offset against the damages resulting to such lot or parcel, without any consideration of the question of apportioning benefits between different parcels. Our attention has not been called to any decisions which, when critically read, we regard as holding to the contrary.

Contention is directed particularly against the admission of evidence which tended to show the amounts which would have been chargeable against the property of appellants as special assessments if the city were constructing this improvement upon the local improvement and assessment plan. That the evidence presented for the purpose of showing the amount such assessment would be was competent and sufficient for that purpose, we think there is but little room for controversy. Indeed, we do not understand that it is seriously contended otherwise; but it is contended that the amount of such assessments that appellants' property would be subject to if the city were proceeding upon that plan in making the improvement, is immaterial to the question of benefits as here involved. It seems to us, however, in view of the fact that appellants' property is going to receive special benefits from this improvement without being compelled to pay therefor by special assessment, that this evidence has a direct and material bearing upon the value of the special benefits so received. We are not able to see any prejudicial effect of this evidence upon appellants' rights, since the amounts which would be assessable against their property would, in no event, be more than the special benefits, and might be materially less than such benefits, since assessments for special benefits

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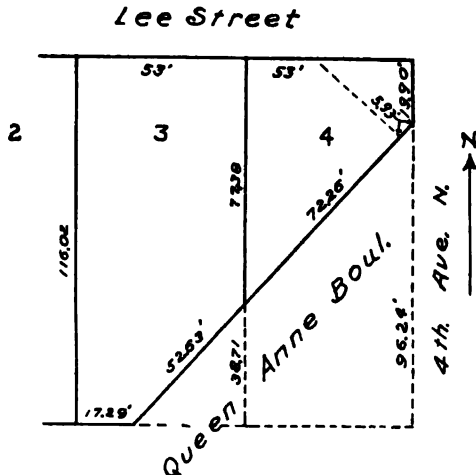
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are not only limited by the amount of such benefits, but also by the amount of the cost of the proposed improvement, which may be materially less than the actual benefits received therefrom. We think there was no error in receiving this evidence, and that it was material as tending to show the amount of special benefits the city was entitled to have offset against appellants' damages.

Contention is made in behalf of appellants Hopkins and Rushtons that the establishment of the grade in front of their property by ordinance No. 26,253, under which these eminent domain proceedings are prosecuted, constituted the change of a previously established grade in front of their property, and that they were entitled to damages upon that theory. The evidence upon the question of there being a previously established grade in front of their property, we think, is such as would warrant the conclusion that there was no previously established grade, and that this was the establishment of an original grade upon that portion of the boulevard. However, the trial court did not so decide as a matter of law, but submitted that question to the jury upon evidence which was quite voluminous, and which we think might lead reasonable minds to different conclusions, with appropriate instructions as to what constituted the establishment of a grade, pointing out how a grade might be established by actual physical improvement, as well as by ordinance. Upon the question so submitted, the jury made a special finding against appellants, finding that there never had been a previously established grade in front of their property. It is apparent, therefore, that counsel's contention upon this question presents only a question of fact, which was found against them by the jury upon evidence which we think was sufficient to support such finding.

It is contended in behalf of appellants Wald and wife that the trial court erred in deciding, as a matter of law, that the two platted, unoccupied lots owned by them, and described by the city in its eminent domain proceedings as being in

some degree damaged by the proposed improvement, constituted a single tract for the purpose of determining both damages and benefits, and in submitting to the jury the question of their damage and benefits upon that theory, which, it is conceded, was the result of the court's rulings. It will be conducive to a clearer understanding of appellants Walds' contention to have before us the plat of their lots as introduced in evidence and conceded to show the location of the lots relative to each other and to the boulevard as follows:



These lots had been platted as a part of Nob Hill Addition, many years before the laying out of Queen Anne Boulevard. As originally platted, they were each fifty-three by one hundred and sixteen feet in area, manifestly of such size as to be separately suitable for ordinary city residence lots. By the first condemnation proceedings, there was taken from these lots a considerable portion off the southeasterly corners thereof, reducing the size of lot three but a small amount, and taking approximately one-half of lot four; leaving lot four, however, of sufficient size for use as a small residence lot, as the evidence tended to show. It is conceded that the lots have never been improved and are unoccupied. The evi-

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dence does not indicate that they are held by their owners with any view to a common use. There is some evidence which may be regarded as indicating that they might be used in common to some advantage; but, if so, it is only because of the manner in which they have been cut by the laying out of Queen Anne Boulevard and not because of anything voluntarily done by their owners. During the trial, appellants disclaimed any damages to lot three, claiming damages to lot four only. The evidence introduced over appellants' objections renders it highly probable that the net damage awarded by the jury for injury to lot four was materially reduced by benefits flowing to lot three. These rulings of the trial court were erroneous if the two lots were, in fact, separate tracts. In the text of 15 Cyc. 768, it is said:

"The benefit resulting to one lot or tract from an improvement cannot be set off in determining the compensation or damages due to the same owner for the taking or injuring of a separate and distinct although contiguous tract."

This, we think, is so elementary that citation of further authority is unnecessary. It is, in principle, the same as where resulting damages are sought to a tract of land not a part of the tract from which appropriated land is taken. That is, in each case, it is only the tract of land physically invaded that is to be considered in assessing either damages or benefits. The real question, then, is: Do these lots constitute separate tracts, or are they one tract for the purpose of this case? Such questions arise in the levying of general taxes, special assessments, and in the determination of damages and benefits in eminent domain proceedings. The problem has been dealt with more frequently where the question turns upon the actual use and occupancy of the land than where unoccupied and unused land is involved. This court has had occasion to deal with the question of what constitutes a single tract in the following cases: *Lockwood v. Roys*, 11 Wash. 697, 40 Pac. 346; *Million v. Welts*, 29 Wash. 106, 69 Pac. 633; *Sultan Water & Power Co. v. Weyer-*

hauser Timber Co., 81 Wash. 558, 72 Pac. 114; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *Seattle v. Atwood*, 59 Wash. 112, 109 Pac. 326; *Idaho & Western R. Co. v. Coey*, 73 Wash. 291, 131 Pac. 810. In the *Lockwood* case, the views of the court would seem to lend support to appellants' contention, while the *Sultan Water & Power Co.* case, viewed superficially, may be considered as lending support to the city's contention. However, when that decision is read critically, there is reason for assuming that the court there regarded the fractional parts of the section as one tract because they were used in common. The other decisions of this court do not aid us here. There appear to be but few decisions of the courts dealing with the question where unoccupied, officially platted town or city lots are involved. The most satisfactory solution of the problem, when so presented is, we think, found in *Wilcox v. St. Paul & N. P. R. Co.*, 35 Minn. 439, 29 N. W. 148, where the court observed:

"One of the questions presented on this appeal from the judgment is as to the propriety of allowing damages in respect to lots from 2 to 9, none of which were touched by the railroad. It may be deemed to have been settled by the decisions of this and other courts that a land-owner, a part of whose property is taken under the law of eminent domain, is not entitled to compensation for consequential injuries resulting therefrom to his entire estate, however extensive that may be, and without regard to the purposes to which it has been appropriated; but that such right of compensation exists only in respect to the tract or parcel of land a part of which is taken. And even though the lands injuriously affected are contiguous to the lands taken, so that the whole may be said to be one body of land, yet the right to compensation may not exist in respect to the whole. If one own distinct, although contiguous, farms, from one only of which land is taken, he is not entitled to compensation for resulting injury to the other. *Minnesota Valley R. Co. v. Doran*, 15 Minn. 179, (230;) *St. Paul & Sioux City R. Co. v. Murphy*, 19 Minn. 433, (500.) And in numerous cases, involving contests of this kind, the use to which the property has been devoted has been deemed an important consideration in

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determining whether lands, being in one body, should be deemed one tract, or several distinct tracts, for the purposes of the assessment of compensation. *Winona & St. Peter R. Co. v. Denman*, 10 Minn. 208 (267); *Minn. Valley R. Co. v. Doran*, *supra*; *St. Paul & Sioux City R. Co. v. Murphy*, *supra*; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 122; *Sherwood v. St. Paul & Chicago Ry. Co.*, Id. 127; *Wilmes v. Minn. & N. W. Ry. Co.*, 29 Minn. 242, (13 N. W. Rep. 39.) In these, and in other like cases, such use, sometimes disputed, as in the cases of *Doran* and *Murphy*, *supra*, would have been unimportant, if the mere contiguity of the lands had been deemed enough to entitle the owner to compensation in respect to the whole.

"If the several lots of which this block consists had been actually appropriated to distinct uses, the owner would not have been entitled to compensation in respect to lots no part of which was taken. *Minn. Valley R. Co. v. Doran*, *supra*. It is more doubtful whether, the lands being unoccupied, he may recover compensation for the whole as one tract. It is perhaps impossible to establish any rule applicable to such cases which will not be subject to criticism. But in respect to city property, in fact unoccupied, but which appears to have been platted or divided into blocks and lots, nothing more being shown, the property should be treated as lots or blocks, intended for use as such, and not as one entire tract. *Prima facie* that character has been given to it by the proprietor. Presumably the division or platting was with a view to the use of the property, or to its disposal and ultimate use, in such subdivisions as have been made; and if any facts exist which might be considered sufficient to rebut this presumption, they should be disclosed. We therefore are of the opinion that the court below erred in allowing damages in respect to lots other than lots 1 and 10."

It is true, in that case, that there was not involved a question of benefits. But the question of damages to a tract not physically invaded, is, we think, determinable upon the same principle. This view also finds support in *Koerper v. St. Paul & N. P. R. Co.*, 42 Minn. 340, 44 N. W. 195, and *Evansville & R. R. Co. v. Charlton*, 6 Ind. App. 56. An exhaustive note reviewing the decisions touching the question of what lands are deemed part of one tract in eminent domain

proceedings is appended to *Sharpe v. United States*, in 57 L. R. A. 932, the effect of plat lines in separating tracts being there noticed on page 938. Apparently the weight of authority supports the Minnesota view, which seems to be, in substance, that regularly platted, unoccupied lots are presumed to be, until shown to the contrary, separate tracts and must be dealt with as such in eminent domain proceedings.

We are of the opinion that the trial court erred in deciding, as a matter of law, that being the effect of its rulings, that lots three and four are one tract for the purpose of determining damages and benefits. Indeed, as the record now stands, it might well be argued that the court should have decided, as a matter of law, that they are separate tracts. This question, however, we need not now decide, since a new trial must be granted appellants Walds because of these rulings of the trial court. The question of when two adjoining lots or tracts shall be treated as one tract or as two tracts would become a question of fact, unless the conceded facts as to their use and situation were such as to leave no room for different views upon that question. What the proof may be touching such question upon a new trial we cannot now anticipate. We only decide that the learned trial court erred in deciding the question as a matter of law against the appellants' contention. It may, or may not, upon a new trial, become a question for the jury. That such question becomes one of fact ordinarily, to be submitted to a jury under proper instructions, is pointed out in the following decisions: *Charleston & S. Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69; *Kosler v. Pittsburg, C. C. & St. L. R. Co.*, 208 Pa. St. 50, 57 Atl. 66; *St. Paul & Sioux City R. Co. v. Murphy*, 19 Minn. 500; *Bergwin v. St. Clair Incline Plane Co.*, 166 Pa. 21, 31 Atl. 71.

There were submitted to the jury interrogatories calling for special findings as to the amounts of both benefits and damages resulting to the several appellants. These the jury answered, and rendered a general verdict in conformity there-

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with by deducting the benefits so found by them from the damages so found by them. Appellants ask a ruling from this court which, in effect, would amount to the direction of entry of judgment by the trial court notwithstanding the verdict in their favor, by eliminating the amounts found as special benefits, and directing judgment for the total gross damages found. Aside from the observations we have already made, we may say that these contentions involve questions of fact only, and a careful review of all those portions of the evidence to which our attention has been directed convinces us that we would not be warranted in interfering with the verdicts so far as the sufficiency of the evidence is concerned.

Several other errors are assigned, but they are presented to us practically without argument. We feel justified in disposing of them in an equally summary manner by simply saying that an examination of the record convinces us that they are without merit.

The judgment awarding damages to Wald and wife is reversed, and they are granted a new trial because of the rulings of the trial court holding, as a matter of law, that their lots three and four should be treated as one single tract. The other judgments are affirmed.

Crow, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

[No. 11666. Department Two. December 27, 1913.]

ALEXANDER MICHAELSON, *Respondent*, v.

GEORGE W. OVERMEYER, *Appellant*.¹

APPEAL—NOTICE—STATEMENT OF FACTS—TIME FOR FILING. The time for taking an appeal or filing a statement of facts runs from the denial of appellant's motion for a new trial, when made after judgment.

SAME—STATEMENT OF FACTS—EXTENSION OF TIME—NOTICE. Under Rem. & Bal. Code, § 393, authorizing an order extending the time for filing a statement of facts, upon notice to the adverse party, an *ex parte* order extending the time is void; and it is immaterial that the extension was obtained by the official stenographer.

SAME—STATEMENT OF FACTS—NECESSITY. The necessity of a statement of facts is not obviated by 3 Rem. & Bal. Code, § 1730-2, relating to abstracts on appeal.

SAME—STATEMENT OF FACTS—EXTENSION—OBJECTIONS. It is not necessary to attack in the superior court a void order extending the time for filing a statement of facts entered without notice.

Appeal from a judgment of the superior court for Pacific county, Wright, J., entered June 27, 1913, upon the verdict of a jury rendered in favor of the plaintiff. Affirmed.

John W. Roberts, for appellant.

John T. Welsh and *Robert G. Chambers*, for respondent.

MOUNT, J.—The respondent moves to strike the statement of facts in this case upon the ground that it was not filed and served within time; and to affirm the judgment, upon the ground that without the statement of facts there are no questions which can be passed upon by this court.

The cause was originally tried in the superior court to a jury. A verdict was returned on June 25, 1913. On June 27th motions for new trial and for judgment *non obstante veredicto* were filed by the appellant. On the same day, a judgment was entered in favor of the plaintiff. The motions

¹Reported in 137 Pac. 332.

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for new trial and for judgment *non obstante veredicto* were denied by the court on July 11, 1913. On July 28, 1913, the court, upon an *ex parte* application and without notice to the respondent, entered an order extending the time for serving and filing a statement of facts until September 10th. On September 4, 1913, the statement of facts was served and filed. Thereafter, no amendments being proposed, it was certified by the court.

The time within which to take an appeal and to file a statement of facts begins to run from the date of the denial of the motion for a new trial. *Chilcott v. Globe Nav. Co.*, 49 Wash. 302, 95 Pac. 264.

The statute at § 393, Rem. & Bal. Code (P. C. 81 § 693), provides that the

“Statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause Provided, that the time herein prescribed may be enlarged either before or after its expiration, once or more, but not for more than sixty days additional in all by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party. . . .”

No notice was given to the adverse party, but an *ex parte* application was made and the court, without notice having been given to the adverse party, made an order extending the time. This order was clearly void, under numerous decisions of this court. In *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56, at page 339, we said:

“The intention of the law is evidently, under this statute, that parties shall diligently prosecute their appeals, and there should be no extension of the time for a settlement of the facts upon which the appeal is to be based, in whole or in part, unless good cause is shown therefor; and this showing should not be made upon an *ex parte* application or hearing if notice can reasonably be given.”

See, also, *Wollin v. Smith*, 27 Wash. 349, 67 Pac. 561; *Harpel v. Harpel*, 31 Wash. 295, 71 Pac. 1010; *State v. Aschenbrenner*, 45 Wash. 125, 87 Pac. 1118; *Williams v. Spokane*, 67 Wash. 368, 121 Pac. 836; *Russell v. Mitchell*, 61 Wash. 178, 112 Pac. 250. Under the rule announced in these cases, it is plain that the motion to strike the statement of facts must be sustained.

The appellant resists the motion upon the ground that the order for the extension of time was obtained by the official stenographer of the court; that the appeal has been diligently prosecuted; that the act of 1913 relating to abstracts of the statement of facts obviates the necessity for a statement of facts; and also upon the ground that the order extending the time should have been attacked in the superior court.

The fact that the stenographer obtained the order did not relieve the appellant from complying with the statute and giving notice and showing cause before the court was authorized to make the order. It is true that the appellant has been diligent in prosecuting the appeal, except in the matter of filing and serving the statement of facts. The act of 1913, page 350, § 2 (3 Rem. & Bal. Code, § 1730-2), expressly provides that nothing therein contained shall alter the present manner of settling statements of facts. It has not heretofore been the practice to require these void orders to be attacked in the superior court. We have, in the cases above cited, where such orders have been made, treated them as void, which they no doubt are. The statement of facts must therefore be stricken. Inasmuch as no questions are raised upon the pleadings, or can be considered by the court without the statement of facts, the judgment must be affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

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[No. 11112. Department Two. December 27, 1913.]

JOHN W. ALTIER, *Respondent*, v. J. WALTER HAINSWORTH,
Appellant.¹

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,000 for personal injuries, reduced by the trial court to \$3,000 is not excessive, where it appears that the plaintiff, 30 years of age, earning \$125 per month as a switchman, sustained a fracture of his leg, and a dislocation of his ankle, lost \$600 or \$700 in wages, and had not fully recovered seven months after the accident.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 25, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Hughes, McMicken, Dovell & Ramsey and *Otto B. Rupp*,
for appellant.

George L. Palmer and *Chas. D. Fullen*, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages for personal injuries which he claims resulted to him from the negligence of the defendant in the driving of an automobile. A trial before the court and a jury resulted in a verdict in favor of the plaintiff for \$5,000. After hearing argument upon the defendant's motion for a new trial, rested upon the ground of excessive verdict, among others, the court was of the opinion that the defendant would be entitled to a new trial upon that ground unless the plaintiff would remit from the verdict the sum of \$2,000 and permit judgment to be entered in his favor for \$3,000 only. This the plaintiff did, and judgment was accordingly rendered in his favor against the defendant for \$3,000, from which the defendant has appealed

¹Reported in 137 Pac. 345.

to this court. No question is here presented other than that of the alleged excessiveness of the verdict.

There was ample evidence tending to show, and which would warrant the jury in believing, the following: The plaintiff, at the time of the injury, was 30 years old, was then in good health and was earning \$125 per month as a switchman for the Northern Pacific Railway Company, with which company he had permanent employment as such. The injuries for which he here seeks recovery consisted of the breaking of the fibula bone of his right leg and the dislocation of his right ankle. As a result of these injuries, his ankle and leg were required to be kept in a cast for eight weeks, he walked on crutches for four months, and was required to refrain from his usual vocation for five months, causing him a loss in wages of some \$600 to \$700. He has also been required to refrain from work to some extent since then. At the time of the trial in the superior court, which occurred approximately seven months after he was injured, he had not recovered. His ankle at times becomes swollen and painful, and he is not able to perform his work with the ease and efficiency he had been able to do prior to receiving the injuries. To what extent he will be so afflicted in the future, is problematical.

The decisions of the courts do not furnish any rule for the measurement of damages which can be applied with any degree of exactness. This is necessarily so by reason of the varying conditions and circumstances attending different injuries. In view of the facts disclosed by the evidence in this case, which we have summarized in so far as the nature and extent of respondent's injuries are concerned, we are quite clear that we cannot say that the awarding him of \$3,000 by the judgment of the trial court was excessive. Our views, expressed in *Payne v. Whatcom County R. & Light Co.*, 47 Wash. 342, 91 Pac. 1084, and *Keane v. Seattle*, 55 Wash. 622, 104 Pac. 819, are in harmony with the conclusion here reached, though those decisions, like all others upon such

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Citations of Counsel.

questions, are only of aid here by way of analogy which seldom, if ever, is capable of exact application.

The judgment is affirmed.

CROW, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

[No. 11196. Department Two. December 27, 1913.]

C. S. BEST, *Executor etc.*, Appellant, v. W. W. FELGER,
*Respondent.*¹

CHATTEL MORTGAGES—RECORDING—RENEWAL—AFFIDAVITS — NOTICE—SUBSEQUENT PURCHASERS. Under Rem. & Bal. Code, § 3662, providing that a recorded chattel mortgage shall cease to be notice as against creditors and subsequent purchasers, after the maturity of the mortgage, unless within two years thereafter it is renewed by the making and filing of an affidavit by the mortgagee, a subsequent mortgagee for value in good faith acquires a valid lien after the maturity of the mortgage, subject only to the possibility that the prior mortgage may be renewed within the two years; the statute being, in substance, a statute of limitations.

Appeal from a judgment of the superior court for King county, Grady, J., entered January 13, 1913, upon findings in favor of one of the defendants, in an action to foreclose a chattel mortgage. Affirmed.

Van Dyke & Thomas, for appellant, contended, *inter alia*, that as against Felger, it was not necessary to file the renewal of the chattel mortgage. Rem. & Bal. Code, § 3662; 6 Cyc. 1095-6; Jones, *Chattel Mortgages* (4th ed.), § 293; *Farmers & Merchants' Bank of Cawker City v. Bank of Glen Elder*, 46 Kan. 376, 26 Pac. 680; *Howard v. First Nat. Bank of Hutchinson*, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537; *Ullman v. Duncan*, 78 Wis. 213, 47 N. W. 266, 9 L. R. A. 683; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 677; *Edson v. Newell*, 14 Minn. 228; *Nix v. Wiswell*, 84 Wis. 334, 54 N. W. 620; *Wade v. Strachan*, 71 Mich.

¹Reported in 137 Pac. 334.

459, 39 N. W. 582; *Flory v. Comstock*, 61 Mich. 522, 28 N. W. 701; *Wolf v. Rausch*, 22 Misc. Rep. 108, 48 N. Y. Supp. 716.

Reynolds, Ballinger & Hutson, for respondent.

PARKER, J.—The plaintiff, as executor, seeks foreclosure of a chattel mortgage, given to Caroline Merryman during her lifetime, as against the claims of the defendant W. W. Felger, who is the holder of a chattel mortgage upon the same property subsequently executed by the same grantor. A trial in the superior court resulted in a decree denying a foreclosure as against the defendant Felger, upon the ground that no affidavit setting forth the amount due upon the Merryman mortgage was filed in the office of the county auditor within two years after the maturity of the debt secured thereby, nor at any time, as required by Rem. & Bal. Code, § 3662 (P. C. 349 § 43). From this disposition of the cause touching the rights of the defendant Felger, the plaintiff has appealed to this court. In so far as the decree and judgment deals with rights of the plaintiff as against other defendants, it is not drawn in question upon this appeal.

The controlling facts are not in dispute. On July 1, 1909, Andrew J. Reed, the owner of the property here involved, executed and delivered to Caroline Merryman a chattel mortgage, to secure an indebtedness evidenced by three promissory notes maturing on and prior to May 1, 1910; the indebtedness and the dates of its maturity being plainly so shown upon the face of the mortgage. On August 15, 1910, after the maturity of the whole of the indebtedness secured by the Merryman mortgage, Andrew J. Reed executed and delivered to respondent Felger another mortgage upon the same property, to secure an indebtedness evidenced by a promissory note for the sum of \$1,100, then loaned by respondent Felger to Reed. Both of these mortgages were duly and timely filed for record in the office of the county auditor. On May 27, more than two years after the maturity

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of all of the indebtedness secured by the mortgage given to Caroline Merryman, she having died in the meantime, appellant, as her executor, commenced this action to foreclose the same as against respondent Felger as well as others claiming interest in the property. There has never been filed in the office of the county auditor any affidavit setting forth the amount due upon that mortgage, as provided in § 3662, Rem. & Bal. Code (P. C. § 49 § 48), which reads as follows:

"Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world, of the existence and conditions thereof, but shall cease to be notice, as against creditors of the mortgagors and subsequent purchasers and mortgagees in good faith, after the expiration of the time such mortgage becomes due, unless before the expiration of two years after the time such mortgage becomes due, the mortgagee, his agent or attorney, shall make and file as aforesaid an affidavit setting forth the amount due upon the mortgage, which affidavit shall be annexed to the instrument to which it relates and the auditor shall indorse on said affidavit the time it was filed."

Counsel for appellant contend, in substance, that since Reed's indebtedness to respondent was incurred, and the mortgage securing the same given, before the expiration of two years following the maturity of the Merryman mortgage, respondent does not belong to the class of persons specified in § 3662 above quoted, who may claim rights superior to the Merryman mortgage, notwithstanding the Merryman mortgage has not been renewed by affidavit as required by that section. Counsel invoke the general rule as stated in the text of 6 Cyc. 1095 as follows:

"It is usually held that a person who purchases mortgaged property within the period when the mortgage is valid without refiling cannot later object that the instrument was not properly filed at the time when renewal should have been made, for the term 'subsequent purchaser' in a renewal statute means purchasers subsequent to the time of the refiling of the mortgage."

A number of decisions of the courts are cited and relied upon by counsel from which this general rule is deduced. They all, however, deal with the rights of parties under statutes in words, or in substance, as follows:

"Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit etc."

This language is quoted from the opinion in *Howard v. First Nat. Bank of Hutchinson*, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537. The substance of the holding in that decision is stated in the syllabus as follows:

"The words 'subsequent purchasers' and 'subsequent mortgagees in good faith' in § 3905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage."

The holding of all the other decisions to which our attention has been called are in harmony with this view, but all of them deal with statutes either identical or in substance the same as the Kansas statute. No decision has come to our notice dealing with the rights of parties arising subsequent to a first mortgage under a statute like ours. Under the Kansas statute, the mortgage expires as to those subsequently acquiring rights, upon the "*expiration of one year after the filing thereof*" in the absence of the filing of the renewal affidavit thirty days *preceding* such expiration; while under our statute, the mortgage expires as to those subsequently acquiring rights upon the "*expiration of the time such mortgage becomes due*" in the absence of the filing of the renewal affidavit within two years *thereafter*. In the case before us, respondent Felger acquired his rights under the second mortgage, when he made the loan to Reed, sev-

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eral months after the expiration of the time the first mortgage became due, which mortgage, we have noticed, has never been renewed by affidavit as required by statute, though over two years elapsed after its maturity before it was sought to be foreclosed by this action. This situation, it seems to us, answers the question of the superiority of the rights of the respective mortgagees in favor of respondent; unless the fact that the Merryman mortgage was of record, and subject to renewal at the time the second one was given to respondent, continued the Merryman mortgage in force as against him. But here we are met with this distinction between the Kansas statute and our own. By the provisions of the Kansas statute, under no circumstances can a subsequent mortgagee's rights intervene or supersede the rights of the first mortgagee before the time specified as the limit of the first mortgagee's rights, because the renewal affidavit, under that statute, must be filed thirty days *before* the expiration of the mortgage, which, as we have noticed, is one year after its filing; while under our statute, the mortgagee has two years *after* its maturity during which period his mortgage will remain in force if renewed by filing the affidavit within that period. Our statute recognizes the possible good faith of those acquiring rights after maturity of the prior mortgage, and before the expiration of two years thereafter. It seems to us that, in view of these provisions, a subsequent purchaser or mortgagee for value—and that, we think, is as far as his good faith need extend—may acquire rights subsequent to the *maturity* of a prior mortgage, subject only to the possibility of such prior mortgage being thereafter renewed by affidavit within two years after its maturity. We are of the opinion that our statute is, in substance, a statute of limitation, in so far as the rights of purchasers and mortgagees who acquire rights in the property after the maturity of the first mortgage are concerned, and that as to such there can be no renewal of the prior mort-

gage after the expiration of two years following its maturity.

The judgment is affirmed.

CROW, C. J., FULLERTON, MOUNT, and MORRIS, JJ., concur.

[No. 11290. Department Two. December 27, 1913.]

MANZA MATSUDA, *Respondent*, v. JENNIE H. HAMMOND *et al.*,
Appellants.¹

EVIDENCE—RES GESTAE—ADMISSIBILITY. Since the trial court may exercise a discretion in excluding matters pertaining to the *res gestae* which are not closely related to the principal fact in question, it is not reversible error in an action for assault and battery, to exclude evidence of plaintiff's conduct after the assault had been completed and defendant had started away.

NEW TRIAL—MISCONDUCT OF JURY—EXCESSIVE VERDICT—REMISSION. The trial court may grant a new trial, conditionally, unless part of an excessive verdict is remitted, even though it is found that, because of the size of the verdict, it was influenced by passion or prejudice.

MASTER AND SERVANT—LIABILITY FOR TORTS OF SERVANT—SCOPE OF EMPLOYMENT. The general manager of a produce commission business acts outside of the scope of his employment, where, in attempting to collect for goods supposed to have been wrongfully taken, he committed an assault and battery upon a customer whom he charged with larceny.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered January 17, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed as to one defendant; reversed as to the other.

Frank H. Kelley and *Ralph Woods*, for appellants.

Edwin F. Masterson and *John E. Owen*, for respondent.

FULLERTON, J.—This action was brought by the respondent against the appellants to recover damages for personal

¹Reported in 137 Pac. 328.

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injuries received in an assault and battery, committed upon the respondent's person by the appellant John Bell.

For sometime prior to the assault, the appellant Hammond conducted a produce commission business, in the city of Tacoma. The appellant Bell was her manager, and at the time of the assault had full charge of her business, Mrs. Hammond then being away from Tacoma on a visit to the eastern states. The respondent conducted a fruit and vegetable stall in the Tacoma public market. He traded somewhat extensively at Mrs. Hammond's place of business, always paying cash for the produce purchased. He was at her place of business on the evening preceding the day of the assault, making certain purchases, and when he left, the appellant Bell conceived the idea that he had carried away a crate of strawberries for which he had not paid. Bell told one of the deliverymen to call upon the respondent on his return that evening and demand payment for the crate. The deliveryman on his return reported that he was not able to collect the amount demanded, as the respondent denied taking the berries. The appellant Bell, on the next day, went himself to the respondent's place of business and demanded that the respondent pay for the berries, telling him that if he did not pay for them at once he would have him arrested for larceny. The respondent again denied taking the berries, and during the altercation which followed, Bell became abusive, whereupon the respondent told him to go away. Bell then struck him in the face with his fist, breaking his nose and causing it to bleed somewhat freely. After striking the blow, Bell immediately left the place, going back to his employer's place of business. The injury caused the respondent some suffering, kept him away from his place of business for some three weeks, and left his nose deformed.

On the trial of the action, the jury returned a verdict in the respondent's favor for the sum of \$556. A motion for a new trial was filed, on the hearing of which the court held the verdict excessive, and gave the respondent an option to take

a judgment for \$400 or submit to a new trial, reciting in its order that the verdict "appeared to have been given under the influence of passion and prejudice." The respondent accepted the first alternative, and judgment was entered in his favor for \$400 against both appellants.

The appellants first assign that the court erred in the exclusion of evidence. A witness on behalf of the appellants testified that, after Bell had struck the respondent, the respondent picked up a paper rack on which there was a small roll of wrapping paper, when he was seized by some one standing near. On motion of the respondent, this evidence was withdrawn from the jury on the ground of immateriality. The appellants argue that it was a part of the *res gestae*, and hence its exclusion is error under all circumstances. But the rule is not thus broad. While matters pertaining to the *res gestae* are usually admissible, they must bear some material relation to the principal fact in question before it is error to exclude them. When they are not closely related, the court may exercise a discretion in their admission or exclusion, and its ruling will be reviewed for error only when it is evident that its ruling has operated to the prejudice of the complaining party. Under the facts disclosed by the record, we are unable to say that the court did not properly exercise its discretion in this instance. Prior to the commission of the act attempted to be shown, the assault and battery had been completed, and the appellant had started away from the scene. The respondent's subsequent conduct could hardly be so closely related to the principal question in issue as to make its exclusion reversible error.

It is next assigned that the court erred in refusing to set aside the verdict after it found that the verdict appeared to have been entered under the influence of passion and prejudice. Unquestionably the court could, without committing reversible error, have set the verdict aside and granted a new trial for the reason assigned; but, under our practice, it was not compulsory upon it to do so. From the order as a whole,

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it is evident that the judge was led to the belief expressed in the order solely because of the size of the verdict, as he found no fault with the conclusion of the jury that the respondent was entitled under the evidence to some recovery. It was, therefore, within his province either to grant a new trial unconditionally, or to grant it on the condition that the respondent refused to accept a judgment in such sum as he conceived the jury were warranted in finding as compensation for the injury. In so far, therefore, as the judgment affects the appellant Bell, we find no reversible error in the record.

On behalf of the appellant Hammond, the additional contention is made that the appellant Bell, when he assaulted and beat the respondent, was not acting within the scope of his authority. This contention, we think, is well founded. The authority of Bell, as shown in the record, was to act as general manager of Mrs. Hammond's business. This grant of authority would unquestionably authorize Bell to make collections for goods sold from her place of business, and to exact settlements for goods wrongfully taken therefrom; but it would not, without something more, render her liable for unlawful acts of Bell committed while making such collections or settlements. An employer is liable for the unlawful and criminal acts of his employee only when he directly authorizes them, or ratifies them when committed; or, perhaps, continues an employee in his employment after he has knowledge that the employee has committed, or is liable to commit, unlawful acts while in the pursuit of his employer's business. The liability does not arise from a mere contract of employment to do a legitimate and lawful act.

In *Johanson v. Pioneer Fuel Co.*, 72 Minn. 405, 75 N. W. 719, the corporation owned a coal dock in the city of Duluth, where it stored, cared for, and handled coal, which, in the course of its business, it sold to its customers. It employed a person to attend to its business at the dock, and the employee sold a ton of coal to a purchaser, who took a part of it away at two different times. When the purchaser returned

for the remainder, the employee charged him with having procured larger sacks than he had at first used, and of wrongfully attempting thereby to obtain more coal than he was entitled to. This the purchaser denied, whereupon the employee became enraged and assaulted and beat the purchaser. The assault and beating was held to be an independent tort on the part of the employee, not within the scope of his employment, and one for which the employer was not liable. In the course of the opinion, the court said:

"The time and place of the transaction in this case do not constitute the test of the master's liability. In order to hold the master liable, the act causing the injury must pertain to the duties which the servant was employed to perform. When the relation of master and servant ceases, all liability for the act of the persons employed ceases also. *Wood, Mast. & Serv.* 538. And the test of liability of the master depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. *Id.* 535. We hold that the assault by McKee upon plaintiff was an independent tort, for which the Pioneer Fuel Company was in no way liable, that the bald statement in the complaint that it was done by the servant while in the course of his employment is not, taken in connection with the other facts stated in the complaint, sufficient to charge the master. *Campbell v. Northern Pac. R. Co.*, 51 Minn. 488, 53 N. W. 768."

In *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 552, Rebori employed one Sansone as his agent for collecting bills. An account against Collette which Collette disputed was given him to collect. In endeavoring to make the collection, the agent got into an altercation with the debtor, during the course of which he assaulted and beat him. It was held that the employer was not liable, the court saying:

"The best considered cases hold that the master is liable to third persons for the negligent, fraudulent or tortious acts of his agent or servant when it is shown that the agent or servant was acting within the scope of his employment and that the act complained of was done as a means or for the purpose of doing the work assigned him by the master. To assault

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and beat a creditor is not a recognized or usual means resorted to for the collection of a debt, nor is it one likely to bring about a settlement of a disputed account. The evidence shows that when the plaintiff returned to the store for the purpose (as he says) of amicably settling the disputed account and made known to Sansone his purpose, Sansone did not take up the settlement of the account with him, but without the least provocation assaulted and beat him, not for the purpose of settling or collecting the account, but to gratify his private malice against the plaintiff. He was not, therefore, about his master's business nor acting within the scope of any authority delegated to him by defendant. For these reasons the rule of *respondet superior* does not apply."

To the same effect are the cases of *Meehan v. Morewood*, 52 Hun 566; *Lytle v. Crescent News & Hotel Co.*, 27 Tex. Civ. App. 530, 66 S. W. 240; *Murphy v. Buckley-Newhall Co.*, 151 App. Div. 520, 136 N. Y. Supp. 309; *Brown v. Boston Ice Co.*, 178 Mass. 108, 59 N. E. 644, 86 Am. St. 469. See, also, from this court: *Thorburn v. Smith*, 10 Wash. 479, 39 Pac. 124; *Linck v. Matheson*, 63 Wash. 593, 116 Pac. 282.

Cases cited from this and other courts, holding common carriers liable for assaults committed upon the persons of passengers by the carrier's employees while in the course of transportation, rest on a different principle and are not in point. Carriers owe to their passengers the nondelegable duty of protecting them, not only from assaults by their own employees, but from the assaults of persons generally. The rule rests upon principles of public policy, not on the relation of employer and employee. On the same principle, our own case of *Chase v. Knabel*, 46 Wash. 484, 90 Pac. 642, 12 L. R. A. (N. S.) 1155, is distinguished from the case at bar.

The cases cited holding an employer liable for the acts of an agent employed to retake articles sold on conditional bills of sale, which have not been paid for according to the contract of sale, are not so easily distinguished on principle. The liability seems to be made to rest on the peculiar character of the employment, which, from its nature, is liable to create disputes and consequent breaches of the peace. But without

specially reviewing the cases, we think they may be regarded as exceptions to the general rule announced, rather than as establishing a contrary rule.

The judgment is affirmed as to the appellant Bell, and reversed and remanded with instructions to dismiss as to the appellant Hammond.

Crow, C. J., MOUNT, PARKER, and MORRIS, JJ., concur.

[No. 11465. Department Two. December 27, 1913.]

OSCAR F. DAHL, *Respondent*, v. PUGET SOUND IRON & STEEL
WORKS, *Appellant*.¹

MASTER AND SERVANT—SAFE PLACE—ASSUMPTION OF RISKS. A servant who made daily use for a year and a half of a perpendicular ladder nailed to the side of a building assumes the risks from improper construction of the ladder, or want of sufficient light, or from the fact that the ladder was perpendicular, throwing great weight on the hands.

MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The negligence of the owner of a foundry, in removing one step of a ladder on the side of the building, and allowing a portion of the framework of the building to take its place, but which was too large to be grasped by the hands, is not sufficiently established, where the only evidence of its removal was the statement of the plaintiff, who testified that the ladder was in perfect condition a year and a half before the accident, and he did not notice the defective condition until just before he fell, after having used the ladder many times each day, and six or seven times previously on the day of the accident, there being no evidence that any one else was on the ladder after he had last used it; since he either assumed the risks, or if the step was removed after he last used it, the master had no notice thereof.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 18, 1913, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by an employee in a foundry. Reversed.

¹Reported in 137 Pac. 315.

Peters & Powell, for appellant, contended that the master is not liable in damages for injuries to his employees resulting from the use of a simple implement. *McMillan v. Minetto Shade Cloth Co.*, 134 App. Div. 28, 117 N. Y. Supp. 1081; *Hart v. Village of Trenton*, 115 App. Div. 761, 100 N. Y. Supp. 1092; *Smith v. Green Fuel Economizer Co.*, 123 App. Div. 672, 108 N. Y. Supp. 45; *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Wachsmuth v. Shaw Electric Crane Co.*, 118 Mich. 275, 76 N. W. 497; *Holt v. Chicago, M. & St. P. R. Co.*, 94 Wis. 596, 69 N. W. 352; *Stirling Coal & Coke Co. v. Fork*, 141 Ky. 40, 131 S. W. 1030, 40 L. R. A. (N. S.) 837; *Jenney Elec. L. & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Miller v. Erie R. Co.*, 21 App. Div. 45, 47 N. Y. Supp. 285; *Sheridan v. Gorham Mfg. Co.*, 28 R. I. 256, 66 Atl. 576, 13 L. R. A. (N. S.) 687. The plaintiff assumed the risk in using the ladder. *Borden v. Daisy Roller Mill Co.*, 98 Wis. 407, 74 N. W. 91, 67 Am. St. 816; *Deaton v. Abrams*, 60 Wash. 1, 110 Pac. 615; *McGrath v. Walsh*, 4 N. Y. Supp. 705; *Henggler v. Cohn*, 68 N. J. L. 240, 52 Atl. 280; *Meador v. Lake Shore & M. S. R. Co.*, 138 Ind. 290, 37 N. E. 721, 46 Am. St. 384; *McGill v. Cleveland & S. W. Traction Co.*, 79 Ohio St. 203, 86 N. E. 989, 128 Am. St. 705, 19 L. R. A. (N. S.) 793; *Powers v. New York, L. E. & W. R. Co.*, 98 N. Y. 274; *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 392; *Vanderpool v. Partridge*, 79 Neb. 165, 112 N. W. 318, 13 L. R. A. (N. S.) 668. The following cases from our own court support this principle: *Schulz v. Johnson*, 7 Wash. 403, 35 Pac. 130; *Weeks v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Meyers v. Ideal Steam Laundry Co.*, 60 Wash. 134, 110 Pac. 803; *Taylor v. Washington Mill Co.*, 50 Wash. 306, 97 Pac. 243; *Wilson v. Cain Lumber Co.*, 64 Wash. 533, 117 Pac. 246; *Nordstrom v. Spokane & I. E. R. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364; *Goddard v. Interstate Tel. Co.*, 56 Wash. 536, 106 Pac. 188; *Shore v. Spokane & I. E. R. Co.*, 57 Wash. 212, 106 Pac. 753;

Breckick v. Welch, 62 Wash. 623, 114 Pac. 435; *Mayer v. Queen City Lumber Co.*, 64 Wash. 567, 117 Pac. 392.

Dovell & Dovell, for respondent.

FULLERTON, J.—The appellant owns and operates an iron foundry, located at the city of Tacoma. The respondent was employed by the appellant to operate a traveling crane, running lengthwise through the foundry building, used to carry heavy material from one part of the building to another. The crane was operated by electricity, and ran upon tracks constructed some distance above the foundry floor. To enable the operator to get upon the crane, a ladder was constructed at one end of the building by nailing cross-pieces on the studding of the framework of the building, at suitable distances apart to make proper steps. The respondent began working for the appellant on January 10, 1910, and worked until 2:15 p. m., August 24, 1911, when he fell from the ladder while mounting it for the purpose of getting upon the crane. He received injuries from the fall which incapacitated him for work for the time being, and he laid off until November 6, 1911. On that day, he resumed the work of operating the crane, and worked continuously thereat until the first of June, 1912.

He began the present action on June 19, 1912, to recover damages for injuries received from the fall from the ladder on August 24, 1911. In his complaint, after alleging certain preliminary matters, and the fact that he was obligated to ascend and descend the ladder in the performance of the duties for which he was employed, he stated his cause of action in the following language:

“(4) That on the 24th day of August, 1911, while plaintiff was engaged in the usual course of his employment and was climbing said ladder, without any knowledge of or the reasonable means of ascertaining any defect therein, and believing that said ladder was safe for the use to which it was applied, and because of the negligent manner in which said

defendant had constructed and was maintaining said ladder, which facts were well known to the defendant, plaintiff fell from the twenty-third step of said ladder to the ground with great force and violence, and was thereby severely injured, as is hereinafter more fully set out.

"(5) That the defendant was knowingly negligent in that it failed to provide and maintain a reasonably safe place for plaintiff to work; that defendant was further negligent, and knowingly so, in that it had negligently constructed said ladder by nailing cross pieces, as steps, on to two of the adjacent studding of said foundry, at spaces of about fifteen inches apart, and had so constructed said ladder in a corner of said foundry where no light reflected thereon from any window or door; that it had built said ladder perpendicular to the ground, thereby throwing great weight on the hands in climbing same; that it had knowingly and negligently removed the twenty-third step of said ladder, and had allowed same to continue so defective; and had so constructed said ladder that plaintiff after climbing same had to turn completely around from his position on said ladder before he could step on to the platform at which said crane was stationed; that defendant was further knowingly negligent in that it allowed a portion of the framework of said foundry to remain in the position on the said ladder at which the said twenty-third step had been nailed, and which said piece, or portion of the framework, was by this plaintiff believed to be a step of said ladder, but was in fact not said step and was much too large and thick to be grasped by the hands in climbing said ladder; all of which said facts were well known to the defendant, and were unknown to this plaintiff, and beyond his means of ascertaining; and which said negligent acts on the part of the defendant caused the injury to this plaintiff as aforesaid."

An answer to the complaint was filed, denying its material allegations, and pleading affirmatively contributory negligence and assumption of risk. On the issues made, a trial was had, resulting in a verdict and judgment for the respondent in the sum of \$1,000. The assignments of error made by the appellant suggest but a single question, namely, the sufficiency of the evidence to justify the verdict and judgment.

The evidence of the respondent, save in the particular hereafter commented upon, in the main reflected the allegations of the complaint. It is at once apparent, however, that he has no cause of action based upon the allegations to the effect that the ladder was improperly constructed, that there was a want of sufficient light, or that the ladder was perpendicular "thereby throwing great weight on the hands in climbing the same." His action was brought under the general statutes, not under the factory act, and the defense of assumption of risk was open to the appellant. Clearly, the daily use of the ladder by the respondent for the more than a year and a half preceding the accident made him acquainted with all of the defects of which he here complains, and he must be held to have assumed all risk of injury arising therefrom.

The only allegations of negligence in the complaint upon which a recovery can rest, therefore, are the allegations to the effect that the appellant had knowingly and negligently removed, or suffered to be removed, the twenty-third step or rung of the ladder, and had allowed the same to remain in its thus defective condition; and knowingly and negligently allowed a portion of the frame work of the building to remain in a "position on the said ladder at which the said twenty-third step had been nailed," which piece was believed by the respondent to be a step in the ladder, and which was too large to grasp by the hands in climbing the ladder.

The evidence, however, falls far short of establishing these allegations. Bearing upon the question, the respondent testified that the ladder was in perfect condition when he began work on January 10, 1910, and that he did not discover the absence of the rung until after he fell from the ladder on the afternoon of August 24, 1912, when he "naturally looked up" and saw that it was missing, although he climbed up and down the ladder many times each day he worked thereon, sometimes as many as fifteen or sixteen times, and on the day of the accident as many as six or seven times. He saw no one go up the ladder on the day of the accident, nor did he

see any one working at that part of the building during that day who would be likely to remove the step, although he was at his place of work during all of the working hours preceding his injury. Nor is there elsewhere in the record anything from which it could be inferred that the rung or step of the ladder was removed between the times the respondent had last climbed it and the time he received his injury. The positive evidence in the record is to the contrary, the evidence of the appellant being to the effect that it had not been removed, but was there at the time the respondent fell.

There is, therefore, no ground upon which the judgment can rest. If it be a fact that the respondent discovered the absence of the step, or by ordinary observation could have discovered its absence, and used the ladder without making the fact known to his employer, he is estopped from claiming damages for any injury arising therefrom on the doctrine of assumption of risk. Or if the absence of the rung was of such minor importance that the respondent could not have reasonably discovered it after climbing over it from six to fifteen times each working day, it is not to be supposed that any reasonable inspection on the part of the appellant would have discovered it. If, on the other hand, it is to be supposed that the rung was removed between the time the respondent last safely climbed the ladder on the day of the accident and the time he attempted to climb it and fell therefrom, the time is too short to warrant the jury in finding, in the absence of evidence of special circumstances, that the appellant, by the exercise of reasonable diligence, ought to have discovered its absence.

It is unnecessary to pursue the inquiry. The judgment must be reversed and remanded with instructions to enter a judgment to the effect that the respondent, plaintiff below, take nothing by his action. It is so ordered.

CROW, C. J., MOUNT, PARKER, and MORRIS, JJ., concur.

[No. 10892. Department Two. December 29, 1913.]

FANNY SCHOENNAUER, *Respondent*, v. ARTHUR C. J.

SCHOENNAUER, *Appellant*.¹

PARENT AND CHILD—ACTION FOR SUPPORT—DEFENSES—DIVORCE—EFFECT. A decree of divorce on the ground that the wife had abandoned her husband, does not preclude a subsequent action by the wife to recover for the support of a minor child, where the complaint in divorce made no mention of the child and no steps were taken to give the court jurisdiction to make proper orders for its custody and support, or any disposition of the property rights of the parties.

DIVORCE—CUSTODY AND SUPPORT OF CHILD—JURISDICTION. The fact that the defendant wife in an action for divorce was a nonresident, does not prevent the court from making orders for the custody and support of a child, if defendant appears and submits herself and child to the jurisdiction of the court.

PARENT AND CHILD—DUTY TO SUPPORT—DIVORCE. The duty of a father to provide support for his minor child cannot be escaped by obtaining a decree of divorce from his nonresident wife, ignoring the existence of the child.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered July 22, 1912, upon findings in favor of the plaintiff, in an action to recover for the support of a minor child. Affirmed.

M. J. McGuinness and *Robert McMurchie*, for appellant.

McClure & McClure and *Howard Waterman*, for respondent.

Crow, C. J.—Plaintiff and defendant were formerly husband and wife, and are the parents of a minor son, now about ten years of age. They lived in Chicago, Illinois, until December 17, 1906, at which time the husband moved to Seattle; his wife and child remaining in Chicago. On January 30, 1908, the husband commenced an action for a divorce in the superior court of Snohomish county. Service was made by

¹Reported in 137 Pac. 325.

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publication. The wife defaulted, and on April 20, 1908, a decree was entered granting a divorce on the ground of abandonment. The complaint made no mention of the minor child or of any property rights, nor did the final decree contain any reference thereto. The child remained with, and has since been supported by the mother, who, on March 4, 1911, commenced this action in the superior court of King county, against her former husband, the defendant herein, to recover \$1,200 expended by her in supporting the child, and to obtain an order requiring defendant to make monthly payments for future support of the child. From a judgment in plaintiff's favor for \$400, and for the further sum of \$10 per month to be hereafter paid, defendant has appealed.

Appellant contends that the decree, which is not assailed, constitutes an adjudication to the effect that he was in fact abandoned by his former wife, and that she was in the wrong. He alleges that, after he came to this state, he requested his wife to join him; that he provided her with means for so doing, but that she at all times refused. Respondent alleges that she did not abandon appellant, but that he abandoned her; that she had no actual knowledge of the divorce action until long after the final decree had been entered; and that the appellant has remarried, for which reason she has refrained from attacking the validity of the decree. At the trial, the record in the action for divorce was, upon stipulation, admitted in evidence. The trial judge thereafter refused to admit any other evidence, further than such as would show what disbursements respondent had made in supporting the child, and what such support would hereafter cost. Respondent offered to show that, about three years after her marriage to appellant, she instituted an action for divorce in the courts of Illinois; that her action was prosecuted to a final judgment for separate maintenance, which judgment also awarded her custody of the child, and alimony payable monthly; that shortly thereafter, learning that appellant had sold his real estate and was about to leave for Seattle, she

caused his arrest; that, by reason of his persuasion, she and appellant then resumed their relations as husband and wife; that, immediately thereafter, he, without warning, abandoned her and came to Seattle; that she wrote him repeatedly during the succeeding year; that he sent her railroad transportation to bring her to Seattle, but that she was too ill to travel; that her illness continued for several months; that she wrote appellant advising him that she would come to Seattle as soon as she was able to undertake the journey; that she did not hear from him thereafter; that she wrote him repeatedly; and that she had no knowledge of the divorce proceedings until after the entry of the decree. This and other offers made by respondent were excluded, upon appellant's objection. Evidence was admitted showing that the appellant had remarried, and disclosing his present income.

The record before us is devoid of any suggestion that, in the action for divorce, at any time subsequent thereto, or in this proceeding, after respondent had subjected herself to the jurisdiction of the courts of this state, appellant attempted to obtain the custody of the child, offered to provide the child with a home, or contributed to its support. Appellant's sole contention is that, because the decree of divorce, which has not been assailed, was rendered on the ground that he had been abandoned by his wife, she was in fault; that she must be so considered for all purposes; that she has wrongfully retained the custody of the child, and that she is not entitled to any recovery herein.

This contention is without merit and cannot be sustained. Whether it be assumed that appellant abandoned his wife, or that she abandoned him, the rights of their child would not be affected, nor would the appellant be relieved of the duties or obligations imposed upon him to contribute to its support. Conceding that the abandonment of appellant by respondent has been adjudicated by the superior court of Snohomish county, it would not follow that the minor child could not have been awarded to respondent, nor that suitable provision

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for its support at appellant's expense could not have been made, had the superior court of Snohomish county obtained the necessary jurisdiction to make proper orders for such custody and support. In his complaint for the divorce, appellant made no allegation whatever with reference to the child. He now insists that it was not necessary to do so, for the reason that respondent could only be served by publication, and that the courts of this state would not have personal jurisdiction of respondent, but would only have jurisdiction of the marriage status. The purpose of service by publication is to give notice to a defendant, and it must be assumed that a defendant upon receiving such notice may voluntarily appear and defend. Appellant could not assume, when preparing his complaint, that the respondent might not appear and subject herself and child to the jurisdiction of the court. The omission of any reference to the child in his complaint was not respondent's fault. We fail to understand any principle upon which it can be held that respondent's right to obtain compensation for supporting the child, or to obtain a decree for its future support, has been foreclosed by the decree of divorce upon which appellant now relies. Rem. & Bal. Code, § 989 (P. C. 159 § 15), provides that,

"In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody and support and education of the minor children of such marriage."

Where a divorce has been granted upon constructive service in a foreign jurisdiction, and without any adjudication of property rights, the courts of this state, upon obtaining jurisdiction of the subject-matter and the parties, may grant relief relative to property rights. In *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931, it appeared that the defendant had

deserted his wife in the state of Wyoming; that she obtained a decree of divorce in that state upon constructive service; and that the decree made no disposition of their property rights. The parties owned real estate in this state, and thereafter the former wife brought an action in the courts of this state for a division of the property and for alimony. In passing upon the issues thus raised, we said:

"The question of importance discussed here is whether the plaintiff can maintain this action. It is apparent that the district court of Wyoming only had jurisdiction to decree a divorce, and there was no adjudication of the property rights of the plaintiff and defendant in the case before that court. The disposition of the property between plaintiff and defendant in this state must depend upon the law here. It is true, as stated by counsel for defendant, that a decree of divorce between the parties here puts the property matters at rest, as determined in *King v. Müller*, 10 Wash. 274 (38 Pac. 1020); but in that case the property rights were in issue, and the court had jurisdiction to determine the same. The parties and the subject matter of the litigation were before the court. In the decree made by the Wyoming court, neither the defendant nor the property was within the jurisdiction of the court. The Wyoming court had jurisdiction over the status of the plaintiff only, the defendant not being personally served with process and not having submitted to the jurisdiction of the court; and it seems that in such cases the wife may afterward obtain from the court of the domicile of the husband further relief as to the property and alimony."

Commenting on Ballinger's Code, § 5723 (Rem. & Bal. Code, § 989), we further said:

"It is true, a decree for the disposition of the property of the parties, upon the dissolution of the marriage, such as shall appear just and equitable, and having regard to the respective merits of the parties and to the condition in which they will be left, provided for in § 5723, Bal. Code, is incidental to divorce; but it is not identical with it, or a necessary part of it, and there should be sufficient reason shown why such disposition of the property was not made pending the action when the divorce was granted. The cause for such disposition of the property of married persons, and the au-

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thority of the court to make such decree upon the respective property rights, arise from the divorce—the dissolution of the marriage status,—and we think it was appropriately done here, and that the court had jurisdiction to try the cause.”

While the case cited adjudicates property rights only, it will be noted that Rem. & Bal. Code, § 989, to which it refers, also provides that the court shall make provision for the guardianship, custody and support and education of minor children. There seems to be no sound reason why the principle announced by this court relative to property rights should not be applied in this case. In *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587, this court said:

“The pertinent question and the one question that really affects appellant is the right of the court to enter a judgment against him for the support of the minor child, and the question resolves itself into this: Can a divorced wife bring an action against her former husband for maintenance for a minor child whose custody has been awarded to her? . . . It is a well established rule of law, and, we think, uncontradicted, that the maintenance of children is a matter which the court can adjudicate at different times during the minority of the child.”

Again in *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. 817, where it appeared that a divorced wife had sued her former husband for expenses incurred by her in the support of their minor children, and also for their future maintenance and education, we sustained a judgment against the father for one-half the amount expended by the mother, and for the payment of a monthly sum in the future, saying:

“Clearly, the wife has every right, moral and equitable, to be reimbursed to the amount of a just proportion of the expense she has been put to in the performance of a duty which equally belonged to both; and the technical legal reason on which the contrary doctrine is based ought not to be permitted to outweigh the evident justice of her claim. On principle we believe the doctrine of the case from this court [*Gibson v. Gibson*, *supra*] to be right, and, though strongly urged to do so, we must decline either to overrule or modify it.”

Appellant insists that neither the *Gibson* nor the *Ditmar* case is pertinent, as in each of these the legal custody of the children had been awarded to the wife in a previous divorce decree. That circumstance does not preclude an application of the principle of those cases to the facts here shown. It is elementary law that the natural duty of a father imposes upon him a legal obligation to provide support for his minor children, and he cannot escape such duty by obtaining a decree of divorce from his nonresident and absent wife, upon constructive service, in an action in which he ignores the existence of his children, for whom he has made no provision, and whom he, in effect, abandons. The contention of appellant, if followed to its legitimate conclusion, would require us to hold that respondent is without remedy, although appellant has permitted her to retain the custody of the child, has not contributed to its support, and has ignored all parental obligation which the law has imposed upon him. This we cannot do.

The judgment is affirmed.

PARKER, GOSE, CHADWICK, and MOUNT, JJ., concur.

[No. 11389. Department Two. December 31, 1913.]

VIOLA McCLANAHAN, *Appellant*, v. PEARL EUNICE
McCLANAHAN *et al.*, *Respondents*.¹

FRAUDS, STATUTE OF—ORAL CONTRACT TO MAKE WILL. An oral agreement between husband and wife to make wills whereby each left all property to the other, is within the statute of frauds and void.

SAME—PART PERFORMANCE—WILLS. The execution of a will is not such part performance of an oral contract to leave property to another as to take the contract out of the operation of the statute of frauds.

WILLS—REVOCATION. A will executed in pursuance of an oral contract to leave property to another, void under the statute of

¹Reported in 137 Pac. 479.

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frauds, is effectually revoked by the making of a subsequent will without notice to the beneficiary.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 12, 1913, on the pleadings, dismissing an action for specific performance. Affirmed.

Tucker & Hyland, for appellant.

Reynolds, Ballinger & Hutson, for respondents.

MOUNT, J.—This action was brought by the plaintiff to specifically enforce an alleged oral contract, entered into between the plaintiff and her husband during his lifetime.

The complaint alleged, in substance, that, on the 14th day of March, 1891, the plaintiff and Enoch C. McClanahan intermarried and remained husband and wife until the death of Enoch C. McClanahan, on the 15th day of May, 1912; that, up to the time of his death, the plaintiff resided with the deceased as his wife; that the plaintiff, at the time of her marriage to the deceased, was possessed of separate estate, consisting of approximately \$6,000; that the deceased did not possess any estate, excepting an expectancy from the estate of one Jane Harmon, deceased; that, on the 11th day of September, 1891, six months after the marriage as above stated, a verbal contract was entered into between the plaintiff and the deceased by which each of them agreed to make, execute, and deliver to the other a last will and testament, devising to each other any and all property that either should have at the time of his or her death, and providing further that all the separate property of the parties should be used for the benefit of the community; that Enoch C. McClanahan, at that time, had three children by a former marriage; that wills were duly made which were exact duplicates, with the exception of the names and that, in the will of Enoch C. McClanahan, his children were mentioned and \$10 given to each of them; that the wills were witnessed by the same persons, and provided for the appointment of the other as sole executor without bonds, and devised all of the property to the

survivor; that, while the plaintiff and Enoch C. McClanahan were living together, on or about September 1, 1894, the plaintiff received the sum of \$800 from her separate estate, and delivered the same to her husband, which money was used by him in the payment of debts against his separate estate; that the contract was lived up to by both parties until four days prior to his death, when he made, executed, and published a will devising to the plaintiff only a life estate in the real estate, leaving the fee simple title thereof to his children. Copies of these wills are attached to the complaint.

After this complaint was served upon the defendants, who are the children of Enoch C. McClanahan by a former wife, two of these children appeared by their attorneys and filed an answer denying the material allegations of the complaint, and alleging, as an affirmative defense, the fact of the death of Enoch C. McClanahan and setting forth that he executed a last will on the 8th day of May, 1912, and that the same was made and published with the knowledge of the plaintiff, which fact was admitted by the reply. Thereupon the defendants filed a motion for judgment upon the pleadings, and for a dismissal of the action. The court granted this motion, on the ground that the plaintiff has a complete remedy in the probate court to determine the validity of the will of Enoch C. McClanahan dated September 11, 1891, and the will dated May 8, 1912; and, for that reason, dismissed the complaint, without prejudice to the rights of the parties to have determined the validity of either of the wills. The plaintiff has appealed from that order.

The appellant states that "the sole question to be determined upon the appeal is whether the contract that was made by the appellant and the decedent is such a contract as equity will specifically enforce, and whether or not the execution of a new will by the decedent prior to his death effectually invalidated the contract of the parties." No other question is presented or discussed in either the brief of the

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appellant or the respondents. We shall therefore proceed at once to a determination of this question.

Two cases almost identical with this case have been presented to this court which we think are determinative of the question now presented. The case of *Swash v. Sharpstein*, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796, was a case where Orley Hull made a parol agreement to the effect that, in consideration that Eva Swash and her sister would waive the right of an appeal in litigation which was then pending between Orley Hull and his daughters, the said Orley Hull would devise to Eva Swash one-fourth of his estate at the time of his death. Eva Swash consented to this, and waived the right of appeal. Afterwards her father died, leaving a will in which he bequeathed to her the sum of \$500. The value of the estate at that time was \$40,000 or more. In that case, after reviewing numerous authorities, this court said:

"The cases cited that do support the plaintiff's contention are overborne by the weight of authority, and the rule seems to be well settled that to enforce a parol contract to make a will there must have been at least some substantial thing done by the testator in his lifetime in pursuance of that contract. This seems to be required for the purpose of placing the proof of the contract beyond all legitimate controversy, and bears directly upon the question of the proof. The fraud to be prevented is the danger of the fraudulent establishment of such contracts, and this is the purpose of the provision of the statute; and the cases which hold that a performance upon the part of one party alone is sufficient seem to lose sight of this fact and assume that the contract can as well be established by the acts of one party alone, against the statute."

Further along in the case, at page 437, this court said:

"If the making of a previous will in pursuance of the contract would not have been a sufficient part performance by Hull, then the nature of this contract was such that it would not admit of a sufficient part performance to make it valid, for there was nothing else for him to do in the premises. Con-

ceding all that the plaintiff claims with reference to the proof, we are still forced to the conclusion, under the authorities, that she is not entitled to a decree for a specific performance, for we are not disposed to add to or extend the exceptions to the rule established by the statute to meet the seeming hardships of a particular case. The fault rests with the parties in not putting their contracts in writing. The rule should not be infringed as freely after the death of one of the parties as in cases where the contract was to be performed during his lifetime. If a period of years had been fixed by the contract for the conveyance of this property by Hull to the plaintiff, instead of a devise, and the parties were all living, under the overwhelming weight of authority there was not a sufficient part performance to authorize its specific enforcement."

This case, it seems to us, is a complete answer to the question presented upon this appeal. The case of *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041, was "in substance an action to enforce specific performance of an alleged contract entered into between Ida Edwall and her deceased husband, by which they agreed to make mutual wills, and in pursuance of which contract they each executed wills on July 3, 1909." Thereafter, on July 9, 1910, Peter Edwall executed another will, wherein he expressly revoked all former wills by him executed and devised his estate to Ward Jesseph, in trust, so that his wife would receive during her lifetime the larger portion of the income therefrom, upon her death his estate to be distributed among certain of his relatives, naming them. In that case we held that the oral agreement was within the statute of frauds, and was void, and that there was no part performance, and therefore affirmed the judgment of the lower court. The wills executed in the *Edwall* case are in all respects similar to the wills executed in this case, and the question presented in the *Edwall* case is the same as is presented in this case. After reviewing many authorities cited in the appellant's brief, and others not cited, we said:

"We are of the opinion that these wills do not, of themselves prove the making of any contract of mutuality on the

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part of the testators, nor that one was made in consideration of the other, though upon their face they appear to have been simultaneously executed before the same witnesses and were, as the evidence shows placed for safe keeping together in the hands of a third person. So far as any written evidence such as is required by the statute of frauds shows, these are individual wills of the simplest possible character, and there is no competent written evidence in this record tending to show that they were made in pursuance of any contract between the respective testators which would in the least impair their power of revocation. It follows that the making of the will of July 9, 1910, by Peter Edwall constituted an effectual revocation of his will of July 3, 1909, unless the effect of the statute of frauds was avoided by part performance of the alleged contract."

In that case we quoted from *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265, as follows:

"A general maxim, which equity recognizes, is that a testator's will is ambulatory until his death. It is a disposition of property, which neither can, nor is supposed to, take effect until after death. I think it needs no further argument to show that to attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement, which is relied upon to change its ambulatory nature, and that the presumptions will not, and should not, take the place of proof."

Then, in the *Edwall* case, after considering the claim of the appellant that there had been a part performance of the contract relied upon, we held that the making of a will in pursuance of a contract required by the statute of frauds to be evidenced by a writing, did not constitute a part performance of such contract so as to render the same enforceable, and concluded by saying:

"We are unable to find in this record any evidence in writing of the existence of a contract between appellant and the deceased in pursuance of which the wills of July 3, 1909, were made by them, and we are not permitted by law to look to parol proof of the existence of such a contract, any more than we are permitted to look to parol proof of the convey-

ance of land. It follows that each of those wills were revocable at the pleasure of its maker, without notice to the other, and that the one executed by Peter Edwall was effectively revoked by his will of July 9, 1910."

These cases seem to us to be directly in point upon the question presented here, and decisive of it.

The judgment appealed from is therefore affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11453. Department Two. December 31, 1913.]

THEODORE F. WETTERNACH *et al.*, *Appellants*, v. JONES-THOMPSON INVESTMENT COMPANY, *Respondent*.¹

VENDOR AND PURCHASER—REMEDIES OF VENDEE—RESCISSION—DEFECTS IN TITLE—DISCRETION—LACHES. It is not an abuse of discretion to refuse a rescission of a contract, asked on the ground of partial failure of defendant's title, where defendant acted in good faith and upon notice of the defect set about to perfect the title, which was done before judgment, and where plaintiffs did not promptly rescind on notice of the defect, but thereafter made valuable improvements, for which recovery was sought; since rescission is not a matter of right, and is defeated by laches.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 31, 1913, upon findings in favor of the defendant, dismissing, on the merits, an action for rescission. Affirmed.

Million & Houser and George Friend, for appellants.

Douglas, Lane & Douglas, for respondent.

MOUNT, J.—The plaintiffs brought this action to rescind a contract of sale of real estate, upon the ground that title to the property sold was not in the defendant. On the trial of the case, the court permitted the defendant to show that, during the trial, it had made good the title to the property

¹Reported in 137 Pac. 442.

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which had been conveyed to the plaintiffs. The court thereupon dismissed the action, but taxed the costs against the defendant. The plaintiffs have appealed from that judgment.

There is no serious dispute in the facts, which are as follows: On December 19, 1907, the appellants purchased from the respondent lot 3, in block 27, and lot 8, in block 28, in Earlington Acre Tracts, in King county, and agreed to pay therefor \$1,600. Three hundred dollars was paid in cash, and the remainder was paid in quarterly payments of \$60 each. These payments were all completed on the 20th day of October, 1909, when the respondent executed and delivered to the appellants a warranty deed to said lots with the usual covenants.

At the time the original contract was entered into, the appellants were shown by the respondent a map or plat, showing the size of the lots. This plat had been made by the respondent upon the supposition that it owned all of the land included therein. Lot 3, in block 27, was shown upon said plat as being on one side of Fourth street, and lot 8, in block 28, was shown as being on the other side of Fourth street. This street was shown upon the plat as a street 60 feet in width. The appellants purchased the property believing the plat to be correct, and that the respondent owned all the land included within the plat.

After the execution of the deed, in October, 1909, the appellants discovered that the strip of land between the two lots was owned by the Seattle-Tacoma Power Company; and that this company also owned a small fraction in the corner of lot 8, in block 28, which fraction amounted to about one-thirtieth of an acre. The appellants thereupon called the attention of the respondent to these facts, and the respondent set about obtaining a deed from the owner of the land upon which the street was located, and of the small tract at the corner of lot 8. The appellants after this time improved the lots by fencing them. They have been in the continuous pos-

session of the lots since the date of the contract. They have cleared the lots of stumps and brush. Fourth street has, for twenty years past, been used as a public highway. The appellants, before the action was begun, tendered a deed to the respondent and demanded the return of the purchase price with interest, and also the cost of the improvements which they had placed upon the property. These improvements were claimed to be worth \$400. The respondent declined to rescind the contract and this action was brought.

The appellants claim that their rights became fixed when they tendered a deed of the property back to the respondent and that they are entitled to rescind and to recover back the money paid and the value of the improvements upon the lots. But we think this does not necessarily follow. In the case of *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161, this court, at page 292, said:

“Rescission is a remedy which is not to be invoked as a matter of course or of absolute right, but, like specific performance, its exercise rests in the sound discretion of the court. 2 Warvelle, Vendors, p. 833. A court of equity in rescinding a contract proceeds upon the assumption that it can result in no injustice to place both parties in the position in which they were prior to the making of the contract; and this can only be fairly done, in cases of contracts in relation to land whose value is largely speculative and subject to sudden changes, soon after the contract is entered into. Before a party can justly claim a rescission he must not only show that the opposite party is derelict, but that he himself is without fault, for the law permits no one to take advantage of his own wrong to terminate a contract which he has knowingly and voluntarily made. There is another principle adopted by the courts and which is often a controlling one in cases like the present, and that is that, where one party to a contract intends to rescind it on account of a breach of it by the other, he must elect to do so speedily on the discovery of such breach. Delay in rescission is evidence of a waiver of the misconduct of the other party and is itself deemed an election to treat the contract as valid and binding.”

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A number of authorities are cited to support this rule. The only complaint made by the appellants in this case is that they purchased the lots supposing that a street was between the lots, and that the lots were of the size represented on the plat. The trial court found that the plat was made in good faith, and that the respondent believed, at the time it was made, that it was the owner of all the property included within the plat, and that the street between these two lots was properly dedicated. Although the street had been occupied as a street for a period of twenty years, it was discovered that it had never been dedicated to public use. Upon learning this, the respondent set about obtaining a dedication of the street. This was concluded before a judgment was entered in the case. The respondent also obtained a deed to the small fraction in the corner of lot 8 and tendered it to the appellants. In short, the appellants have obtained now all that their contract called for. We think it was within the discretion of the trial court to refuse a rescission under these circumstances, because rescission, as was said in *Thomas v. McCue*, is not to be invoked as a matter of course or of absolute right, but rests in the sound discretion of the trial court. If appellants intended to rescind, they should have done so at the time they discovered that the street had not been dedicated. They did not do so at that time, but afterwards placed improvements upon the property by constructing a fence thereon, and permitted the respondent to negotiate with the owner of the land upon which the street was located for the dedication of the street, and for a deed to the fractional corner. We think, under these circumstances, that it was no abuse of discretion on the part of the trial court to refuse a rescission.

The judgment is therefore affirmed.

CROW, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11496. Department One. December 31, 1913.]

WILLIAM KELLY, *Respondent*, v. NAVY YARD ROUTE,
Appellant.¹

CARRIERS—INJURY TO PASSENGERS—ASSAULT BY FELLOW PASSENGERS—DUTY OF PROTECTION—QUESTION FOR JURY. Whether a steamship company exercised the highest degree of care demanded by the circumstances to protect a passenger from the renewal of an assault by a drunken fellow passenger, and whether it had reasonable grounds to anticipate a recurrence of the assault and took effective means to guard against it, are questions for the jury, where plaintiff was brutally assaulted without provocation, by a powerful and dangerous drunken passenger, and the steward, after stopping the first assault, induced the assailant to go to another room telling a fireman to keep an eye on those concerned, there being no one present to prevent a renewal of the assault about 10 minutes later.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—CARRIERS. In an action by a passenger for the renewal of an assault by a drunken fellow passenger, an instruction that the master on board ship must protect passengers, and is considered as committing that which he does not prevent, while erroneous standing alone, is not prejudicial when read in connection with other instructions to the effect that the jury must find notice of the character of the assailant, and reason to anticipate a renewal of the assault.

SAME. Instructions having no relevancy to the issues and so glaringly inapplicable to the facts that the jury could not have been misled are not prejudicial.

CARRIERS—ASSAULT BY FELLOW PASSENGER—EXCESSIVE VERDICT. A verdict for \$1,000 for an assault upon a passenger, who was badly beaten up and suffered partial loss of hearing, coupled with humiliation and loss of time, is not excessive.

Appeal from a judgment of the superior court for King county, Pendergast, J., entered April 11, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action by a passenger assaulted by a fellow passenger on defendant's boat. Affirmed.

Ira Bronson, for appellant.

Marion A. Butler and *Robert H. Lindsay*, for respondent.

¹Reported in 137 Pac. 444.

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Opinion Per CHADWICK, J.

CHADWICK, J.—On the night of March 30, 1912, plaintiff took passage upon a boat belonging to the defendant en-route to his home in the city of Bremerton. On the way, he was assaulted and beaten by a fellow passenger named Moore. Another joined in the assault. The assault was without provocation or excuse. It was the act of a brutal and vicious man somewhat under the influence of liquor. As soon as it became known, the steward of the boat having in charge the lower deck—the assault occurred in the smoking room, a compartment about forty feet long—rushed to the assistance of the plaintiff. The steward was himself knocked down by Moore. Finally he induced Moore to go back into a card room, and plaintiff to go to another seat in the forward part of the compartment. Believing he had the aggressor quieted, and after telling one of the firemen to keep an eye on those concerned, the steward went on about his work. In about ten minutes, Moore came out of the smoking room and walked rapidly forward to the place where plaintiff was sitting, and again, and without provocation or excuse, struck and beat plaintiff in a most inhuman manner. Moore was a man of unusual size and strength, with the reputation among some of the passengers of being a dangerous man, and he seems to have so terrorized those present that no protection was given plaintiff by the passengers. The steward was called after the second assault and again stopped Moore and rendered plaintiff such assistance as seemed needful at the time. Plaintiff brought this action to recover compensation for his injuries; and from a verdict and judgment for \$1,000, defendant has appealed.

The right to recover is based upon the second assault. It is contended that the evidence does not sustain the verdict; that it is affirmatively shown that defendant did all that it might have done to protect plaintiff and that it had no reason to anticipate the second assault.

A carrier is bound to exercise the highest degree of care demanded by the surrounding circumstances in protecting its

passengers, and is answerable for the unlawful conduct of a fellow passenger if, upon consideration of all the facts and circumstances, it could, or might, by the exercise of such diligence as the occasion demanded, have prevented an assault or injury at the hands of a fellow passenger. A passenger, from the time he enters his vehicle, has the right to claim the protection of the carrier from the insults and violence of others, and it is a duty the carrier owes to the passengers, when the circumstances known to it are such as to create a reasonable apprehension of disorderly conduct, to be vigilant and prompt to suppress it when it occurs and to prevent its repetition. Hutchinson, Carriers (3d ed.) §§ 980, 981.

Whether defendant exercised that degree of diligence demanded under the circumstances, and whether it had reasonable grounds to anticipate a recurrence of the assault, and whether it should have taken more effective means to guard against it, are deductions from the facts proper to be left to the jury.

The following instruction is complained of:

"The master has his duties and obligations to perform, for a breach of which he is responsible. Among his duties is that of enforcing his authority to protect both passengers and seamen from maltreatment while on board his ship. He is armed with absolute authority and corresponding responsibility. He has such authority and a like duty to protect the crew from the brutality of the officers. What he permits he justly is considered to commit, and he permits that which he does not by prompt exercise of his authority prevent."

Standing alone, this instruction would undoubtedly be called erroneous, for it practically tells the jury that, if the assault occurred, the defendant is liable, whereas, the rule is as hereinbefore stated; but the court called the particular attention of the jury to the real fact in issue, that is, that in order to warrant a recovery the jury must find that defendant had notice of the character of Moore and reason to believe that he would renew the assault. The instruction, when

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considered with the instructions taken as a whole, will not be held to be prejudicial.

Other instructions are complained of. It is asserted that they have no relevancy to the issue, and are prejudicial. That they have no relevancy to the issue, may be admitted, but they are so glaringly inapplicable to the facts of the case and to the theory of either side that we are unwilling to say that the jury either considered them or might have been misled by them.

Finally, it is contended that the verdict is excessive. The jury awarded the sum of \$1,000. Plaintiff was pretty badly beaten up. It is insisted that one of the elements of his claimed damages, namely, partial loss of hearing, is not in any degree sustained. Plaintiff was before the court and jury, and we feel that we would be unwarranted in disturbing the verdict and the judgment of the trial judge, who passed on the extent of his injuries when ruling upon the motion for a new trial. The verdict is substantial. It may be larger than any of us would have been willing to return, if we had been jurors. Passion and prejudice are not to be inferred from the mere size of the verdict. Where the injury is such that it affects only the earning capacity of the party, so that compensation can be in some degree measured, this court has sometimes made conditional reduction of judgments. Plaintiff suffered injuries which were severe at the time, and we are not prepared to say that the amount of compensation allowed for his injuries, when coupled with damages for humiliation and loss of time, is excessive.

Affirmed.

CROW, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11512. Department One. December 31, 1913.]

**J. J. HUMPHREY *et al.*, Appellants, v. HARRY KRUTZ *et al.*,
Respondents.¹**

DEDICATION—BY PAROL—WHAT CONSTITUTES. There is a parol dedication of an alley where the owner of a block divided it by fencing off each side, leaving an alley uninclosed connecting two public streets, and then sold all the property abutting on both sides of the alley, which was continuously used with his consent and approval for ten years.

SAME—DEDICATION—BY PAROL PROOF. A parol dedication rests in intention and may be proven by parol.

MUNICIPAL CORPORATIONS—ALLEYS—ESTABLISHMENT—PRESCRIPTION. An open, continuous, adverse user by the public for a period of twenty years or more, of an alley fenced off by the owner through a block connecting two public streets, makes the same a public alley by prescription.

SAME—ALLEYS—OBSTRUCTION—RIGHTS OF ABUTTERS. Abutting owners have such an interest in an alley that they may maintain an action to enjoin its threatened obstruction.

SAME—ALLEYS—THREATENED OBSTRUCTION—ACTIONS—ISSUES. Where an answer in an action to enjoin the obstruction of an alley admits that defendants claim title in fee simple and intend to exclude the plaintiffs therefrom, the testimony of a defendant who had not forbidden its public use does not change the issues or show that its obstruction was not threatened.

DEDICATION—ALLEYS—ESTOPPEL—PAYMENT OF TAXES. The payment of taxes and assessments upon a strip of land dedicated as a public alley does not estop the city or abutters from asserting its public character.

QUIETING TITLE—EASEMENTS—PARTIES—ABUTTERS. Abutting owners may maintain an action to quiet title to an easement in an alley and to the fee which they hold subject to the easement.

EASEMENTS—NATURE. An easement, although an incorporeal right, is an interest in land.

Appeal from a judgment of the superior court for King county, Alston, J., entered July 18, 1913, dismissing, on the merits, an action for an injunction, after a trial to the court. Reversed.

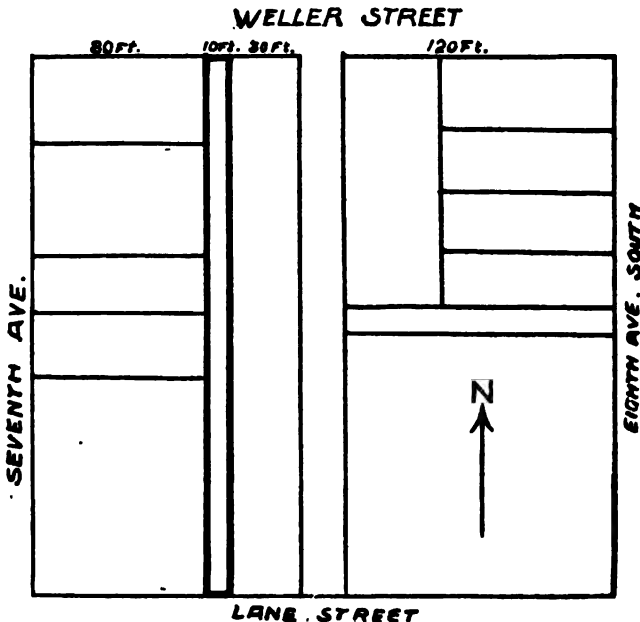
¹Reported in 137 Pac. 806.

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Opinion Per Gose, J.

*Peterson & Macbride and John S. Jurey, for appellants.**Jay C. Allen, for respondents.*

Gose, J.—This action is prosecuted by abutting owners, to enjoin a threatened obstruction of an alleged alley in the city of Seattle, and for general relief. The strip of land in controversy is ten feet wide, and extends from Weller street south a distance of 240 feet, to Lane street. Its west line is 80 feet east of the east line of Seventh avenue. The strip lies within the heavy black lines shown upon the annexed map. A strip of land 80 feet in width lies between the alleged alley and an alley regularly dedicated which extends through the center of the block.



The complaint alleges that the defendants Krutz claim a fee simple title to the strip of land, and that they "propose to appropriate said ten-foot strip for their own private use and benefit, and to exclude plaintiffs wholly therefrom." The

defendants Krutz in their answer "admit that they own and claim to own said ten-foot strip, and that they claim and do assert title thereof in fee simple, and that they propose and will exclude the plaintiffs wholly therefrom." The defendant city in its answer alleges that it claims the land "to be a public alley," and prays that the action be dismissed. At the close of all the evidence, a judgment was entered dismissing the action.

The appeal presents two questions: (1) Does the evidence show that the strip of land in controversy is an alley either (a) by parol dedication, or (b) by prescription? and (2) can the appellants, as abutting owners, upon the facts shown, maintain the action?

In respect to the first question, the trial judge, in passing upon the case, said that, if he were passing upon the merits, he would find that the strip in controversy is a public highway "by virtue of the fact that it was fenced off by Turner, the original owner thereof, leaving a passageway connecting two public streets, and by reason of the fact that it was used continuously, by people having business with the owners of property abutting thereon, for more than ten years, this ownership being open and exclusive under an apparent right." We are in hearty accord with these views. The evidence shows that, in 1888, one Turner and wife, who then owned the entire block, fenced all of the west side of the block up to the west side of the alley in controversy, in one tract, and the thirty-foot strip east of it in another tract, leaving the land in controversy uninclosed. They then sold all the property abutting upon both sides of the strip in controversy by metes and bounds, retaining the legal title to the ten-foot strip. After the death of Turner, and in October, 1905, the widow conveyed the legal title to the ten-foot strip to respondent Harry Krutz, by a quitclaim deed. From 1888 until the regrade of connecting streets in 1909, the strip was used continuously as a public highway, and the end adjoining Weller

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street is still so used. The connection at Lane street makes the use of that end of the alley at present impracticable.

Whether the strip of land was used with the consent of the Turners, the legal owners, or in hostility to the title of the legal owners, the result is the same. If used with their consent and approval, there was a parol dedication to the public. If used without their consent, a prescriptive right is clearly established.

An owner of real property may dedicate it, or an easement in or over it, to a public use. The fact of dedication is a question of intention, and where the dedication rests in parol, it is provable by parol testimony. *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446; *Lueders v. Tenino*, 49 Wash. 521, 95 Pac. 1089; *Roundtree v. Hutchinson*, 57 Wash. 414, 107 Pac. 345, 27 L. R. A. (N. S.) 875. An offer of dedication may be accepted by a public user. 13 Cyc. 465.

If there was no intention to dedicate the land to a public use, there was an open, notorious, continuous, and adverse user by the public for a period of twenty years or more.

The trial court dismissed the action because there had been no actual and, in his opinion, no threatened obstruction of the alley. Entertaining this view, he expressed the opinion that abutting owners could not maintain the action. In this, we think he was in error. The complaint alleges, as we have seen, that the respondents Krutz "propose . . . to exclude" the appellants from using the alley. They answered that "they propose and will exclude" the appellants from using it. This is obviously a threatened interference with the rights of the appellants. The fee of streets and alleys is in the abutting owners, except in rare instances not present in this case. *Rowe v. James*, 71 Wash. 267, 128 Pac. 539; *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988; *Norton v. Gross*, 52 Wash. 341, 100 Pac. 734. An abutting owner has two distinct kinds of rights in a street; the public one which he enjoys in common with all citizens, and private rights which arise from his ownership of contiguous property. 28 Cyc. 856.

" 'Ordinarily an injunction will be granted when the act or thing threatened or apprehended is a nuisance *per se*, or will necessarily become a nuisance, or will be denied when it may or may not become a nuisance, according to circumstances, or when the injury apprehended is doubtful, contingent, or eventual, merely.' 21 Am. & Eng. Ency. Law (2d ed.), 704." *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. 710.

A remote danger will not suffice. It must be threatened and probable. 28 Cyc. 902-3. We have uniformly held that an abutting owner may maintain an action to enjoin an actual or threatened obstruction of the highway. *Brasell v. Seattle*, 55 Wash. 180, 104 Pac. 155; *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797; *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843. In *Brasell v. Seattle*, it was held that abutting owners had such a special interest in a street that they could enjoin the city from carrying out a void ordinance directing its vacation. In *Smith v. Centralia*, abutting owners were permitted to prosecute a suit to set aside a purported vacation of a street, based upon an illegal ordinance.

The respondent Harry Krutz testified that he claimed title to the alley, that he had never forbidden its use as a public way, and that "I had no idea of doing anything except what my rights are legally." It is upon this testimony that the respondents contend that the closing of the alley is contingent and remote, and hence that the cause of action fails. This testimony was given at the close of the trial. An issue had been joined in which the respondents asserted an intention to exclude the appellants from using the alley. The evidence had then conclusively established the status of the strip of land as a public alley. The respondents could not then change the issues and deprive the appellants of their right to have the issues determined upon the testimony. The respondents could have frankly disclaimed title to the alley, but this they failed to do.

The fact that the respondents Krutz paid certain taxes and assessments upon the strip of land, while showing their good faith, does not estop either the city or the appellants from

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asserting its public character. *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

There is another phase of the question upon which the appellants must prevail. As abutting owners, they may prosecute a suit to quiet title to an easement in the alley, and to the fee which they hold subject to the easement. *Davidson v. Nicholson*, 59 Ind. 411; *Standart v. Round Valley Water Co.*, 77 Cal. 399, 19 Pac. 689; *Oates v. Town of Headland*, 154 Ala. 503, 45 South. 910; 32 Cyc. 1308; 37 Cyc. 206, 208; Rem. & Bal. Code, § 809 (P. C. 81 § 1369); *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639; *Cushing v. Spokane*, 45 Wash. 193, 87 Pac. 1121, 122 Am. St. 890; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264; *Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113.

In *Davidson v. Nicholson*, it was held that the plaintiff could quiet his right to an easement of a right of way across the defendant's land. In *Standart v. Round Valley Water Co.*, it was held that the plaintiff could quiet his title in water and in the pipe line through which it was conveyed to his quartz mill.

"The jurisdiction in actions to quiet title or remove cloud does not rest on arbitrary rules; much depends on the facts of the particular case, and in the exercise of the jurisdiction the court is clothed with a large discretion." 32 Cyc. 1308d.

In *Povah v. Lee*, *supra*, in considering the statutes of the state pertaining to actions to quiet title, this court said:

"These statutes were intended to, and do, we think, provide a remedy for every claimant of real property, no matter what may be the nature of the relief required."

An easement, although an incorporeal right, is an interest in land. *Oates v. Town of Headland*, *supra*; *Pacific Yacht Club v. Sausalito Bay Water Co.*, 98 Cal. 487, 33 Pac. 322; 14 Cyc. 1139.

The judgment is reversed, with directions to enter a decree in harmony with the prayer of the bill.

CROW, C. J., ELLIS, CHADWICK, and MAIN, JJ., concur.

[No. 11513. Department One. December 31, 1913.]

**JAMES OLDFIELD, *Respondent*, v. ANGELES BREWING &
MALTING COMPANY, *Appellant*.¹**

LANDLORD AND TENANT—CONTRACT TO LEASE—BREACH—MEASURE OF DAMAGES. Upon breach of a contract to lease by refusing to accept the building, the action is entire, and the owner's measure of damages is his loss, if any, by reason of the difference between the entire rent reserved and the entire rental value for the term at the time of the breach.

SAME—BREACH—DAMAGES—EVIDENCE—ADMISSIBILITY. In an action for breach of a contract to enter into a lease, which provided that the lessee should not engage in any unlawful business, the fact may be shown that the building was within 300 feet of an armory, and therefore could not be leased for saloon purposes, under Rem. & Bal. Code, § 7229.

SAME—DAMAGES — EVIDENCE — ADMISSIBILITY. In an action for breach of a contract to lease a building for a term of years, by refusing to accept the building, plaintiff cannot show the rental value at the time of the breach by showing that the rental value had decreased from year to year.

CORPORATIONS—WRITTEN CONTRACTS—AUTHORITY OF OFFICERS. A lease executed by the president and secretary of a corporation but not attested by the corporate seal, is not admissible without proof of their authority, express or implied, or ratification by the corporation, where their authority was denied.

APPEAL—DECISION—LAW OF CASE. A decision on a former appeal that an instrument was the "bounden contract" of the appellant, on which an action for its breach would lie, is conclusive on a subsequent appeal that the contract was not void on its face.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PLEADINGS—AMENDMENT. An amendment of a complaint so as to present issuable facts, as directed by the supreme court upon a former appeal, does not deprive the defendant of property without due process of law.

APPEAL—DECISION ON PRIOR APPEAL—LAW OF CASE. A decision on a former appeal becomes the law of the case upon a subsequent appeal.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 12, 1913, upon the ver-

¹Reported in 137 Pac. 469.

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Opinion Per GOSE, J.

dict of a jury rendered in favor of the plaintiff, in an action for breach of contract. Reversed.

Willett & Oleson, for appellant.

Charles F. Munday, Walter S. Fulton, and R. L. Blewett, for respondent.

GOSE, J.—This is an action for damages flowing from an alleged breach of a lease. There was a verdict and judgment in favor of the plaintiff. The defendant has appealed. This is the third appeal. See *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 113 Pac. 630, Ann. Cas. 1912C, 1050, 35 L. R. A. (N. S.) 426; and *Id.*, 72 Wash. 168, 129 Pac. 1098. A history of the litigation may be found in these cases. On September 24, 1908, the respondent agreed to erect a building upon certain described property in the city of Seattle, and to lease it to the appellant for the term of five years, commencing upon the day of the completion of the building, at a monthly rental of \$350, payable in advance. The appellant refused to accept the lease. In the first suit, the respondent sought to recover the rental stipulated in the lease up to the time of commencing his action. Upon the first appeal, we held that the measure of damages flowing from the appellant's repudiation of the lease was the difference between the rent reserved for the term and the reasonable rental value of the premises during the same period, saying: "There is but one breach, and there should be but one recovery for that breach;" and that, when the appellant refused to take possession of the building and pay rent, a cause of action, "immediately arose, and the measure of damages was not the rent reserved in the contract, as held by the trial court, but the difference between that sum and the rental value of the premises for the five years fixed in the agreement."

On the second appeal, we again said that there was "but one breach, and that was complete and final, going to the whole contract. It was made by the refusal to accept the building. In such a case, the cause of action is entire, and

the measure of damages is the loss suffered, namely, the difference between the entire rent reserved and the entire rental value for the term."

In keeping with these views, the question to be tried was this, Was the rental value of the premises for the term, that is for five years, in April, 1909, of greater or less value than the rent reserved in the lease? If the former, the respondent was not damaged; if the latter, his damage was the difference between the two amounts to be fixed at the time the breach occurred. That this is the true measure of damages, is the logic of both of these cases. It is also the rule supported by the great weight of authority. *Green v. Williams*, 45 Ill. 206; *Snodgrass etc. v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Tyson v. Chestnut*, 118 Ala. 387, 24 South. 73; *Minneapolis Baseball Co. v. City Bank*, 74 Minn. 98, 76 N. W. 1024; *James v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. 417.

In *Green v. Williams* and *Snodgrass etc. v. Reynolds*, this rule was announced in a suit by the lessee against the lessor for the refusal of the latter to put the former in possession. In *Tyson v. Chestnut*, the same rule was announced, where the lessee had been evicted by the holder of the paramount title. In *Minneapolis Baseball Co. v. City Bank* and *James v. Kibler's Adm'r*, the same rule was declared in a suit by the lessor for the breach of the lease by the lessee. In the leading case of *Masterton v. Mayor of Brooklyn*, 7 Hill 61, 42 Am. Dec. 38, a suit to recover damages for a breach of contract to receive and pay for an article of personal property, the rule was thus stated:

"Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance."

In *Hopkins v. Lee*, 6 Wheat. 109, a suit by the vendee for damages for the refusal of the vendor to carry out his executory contract for the sale of land, the same rule was announced in the following language:

"The rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach."

The same principle was announced in the following cases: *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Hawk v. Pine Lumber Co.*, 149 N. C. 10, 62 S. E. 752.

This doctrine is in harmony with the expressions of this court upon kindred questions. In trover, we have held that the measure of damages is the market value of the article at the time and place of conversion, with legal interest. *McSorley v. Bullock*, 62 Wash. 140, 113 Pac. 279; *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363; *Hofreiter v. Schwabland*, 72 Wash. 314, 130 Pac. 364.

It seems proper to observe that the lease provides that "the lessee shall not conduct or carry on on said premises or suffer or permit to be carried on thereon any illegal or immoral business, or suffer or permit said premises to be used for any illegal or immoral purposes." Laws of 1909, p. 467, § 62 (Rem. & Bal. Code, § 7229; P. C. 337 § 123), provide that no municipal corporation shall grant or renew a license to any one for the sale of intoxicating or spirituous liquors or beverages within a distance of 300 feet from any armory, etc. If this property is within 300 feet from an armory, the limitation applies and that fact may be shown. In short, the question is the value of the lease for the term at the time of the alleged breach, measured by these limitations.

The respondent, over the objection of the appellant, was permitted to offer testimony as to the rental value of the

premises from period to period during the term; that is, from April, 1909, to April, 1910, and so on during the continuance of the leasehold term, which tended to show that such value had depreciated from year to year. This was error.

The lease was admitted in evidence over the objection of the appellant. It was stipulated that it was executed in the name of the appellant by its president and secretary, but the appellant denied their authority to execute it. *The corporate seal was not attached.* There is no evidence tending to show either that these officers had been given express authority to execute the contract, or that they had been clothed with apparent authority, or that they had theretofore executed such instruments, or that they had been held out by the appellant as having such authority, or that their acts had been ratified. In short, as the record now stands, the contract was executed in the name of the appellant by its president and secretary, without authority express or implied, *without the attestation of the corporate seal*, and without any evidence tending to show ratification or estoppel. This did not make a *prima facie* case. Clarke and Marshall, Corporations, p. 2132 *et seq.*; *American Sav. & Loan Ass'n v. Smith*, 122 Ala. 502, 27 South. 919; *City Electric St. R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 34 S. W. 89, 54 Am. St. 282, 31 L. R. A. 535; *Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 84 N. E. 759, 127 Am. St. 391, 16 L. R. A. (N. S.) 1078.

Our statute, Rem. & Bal. Code, § 3686 (P. C. 405 § 25), provides that the corporate powers of a corporation shall be exercised by a board of trustees. In the light of this provision, and *in the absence of the corporate seal*, some evidence was required of the authority of the president and secretary, express or implied, other than the fact of the execution of the instrument. The respondent contends that the lease was admissible as evidence, and cites *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 162, 89 Pac. 495; *Rowland v.*

Carroll Loan & Inv. Co., 44 Wash. 413, 87 Pac. 482; *Harvey v. Sparks Brothers*, 45 Wash. 578, 88 Pac. 1108; *Carrigan v. Port Crescent Imp. Co.*, 6 Wash. 590, 34 Pac. 148, and kindred cases. In the case first cited, it was said that the evidence showed that the note in suit was executed by the president and general manager of the corporation "in the presence of the secretary and other officers of the company. . . . that the corporation had received the benefits by way of money loaned or advanced by respondent, and by way of his labor and services;" and it was held that, where a corporation "allows a person in a large measure to control its business transactions," it must be held to be responsible for his acts in the name of the corporation. In the second case cited, the corporation had by its acts and acquiescence clothed the president with authority to act for it, and had received the benefit of the services for which compensation was allowed. In the third case cited, the corporation had held out the party whose authority was denied as its managing agent, and the corporation had received the benefits of the contract. In the fourth case cited, it was held that, where a corporation names some person as its manager and as such allows him in a large measure to control all its business transactions, "it is responsible for his acts performed as manager in the name of the company." In the other cases cited from this court, there were elements of estoppel, such as knowledge and acquiescence, or the acceptance and retention of benefits flowing from the contract of the officer who assumed to act for the corporation. None of these elements was present in this case.

On the last appeal we said that there was no merit in the claim that the evidence was not sufficient to establish the execution of the contract of lease. In both of the former appeals, sufficient evidence had been offered of the execution of the lease, but that evidence was not presented in this case.

The appellant also contends that the instrument sued on is void on its face. We held otherwise on the first appeal, where we said that, whether called a lease or a contract for a

lease, or by whatever name the instrument was called, it is the "bounden contract" of the appellant, and that an action would lie for its breach. We still adhere to that view.

As we have suggested, the first suit was brought to recover the rent stipulated in the lease up to the time the action was commenced. On the second trial, there was no change of pleadings, and for this reason the judgment was again reversed. We there said:

"The cause of action being the same breach of contract, declared upon in the original complaint, there can be no question as to the right to amend so as to present issuable facts showing damage."

In harmony with this expression, an amended complaint was filed, seeking to recover damages for the breach of the contract. The appellant contends that the amended complaint so changes the cause of action as to deprive it of its property without due process of law, in contravention of the fourteenth amendment of the Federal constitution. The contention seems to us too wanting in merit to require discussion.

The respondent contends that he had a right to stand upon his contract and hold the appellant for the full amount of the rent, and that the rule for measuring damages was incorrectly announced on the first appeal. The appellant insists that, in certain respects, it is not bound by the law of the case as announced on the first appeal. These two contentions may be met together. In passing upon a similar situation, in *Seattle v. Northern Pac. R. Co.*, 63 Wash. 129, 114 Pac. 1038, we said:

"It is urged with great earnestness that the law of the case was not correctly announced upon the former hearing, . . . We are disposed, however, to treat the conclusion reached on the former hearing as the law of the case. We are aware that this rule is not an inflexible one . . . It is, however, fair to the litigants and the trial court, conducive to orderly procedure, and withal sound judicial policy. We have so ruled in many cases," citing them.

The motions for a nonsuit and directed verdict and for a judgment *non obstante* were properly denied. The respondent's counsel asked one of his witnesses whether the rental value of the property "at any time since this lease was entered into" was equal to \$150 a month, and the witness answered that it never exceeded that sum.

To summarize: The law of the case is that the contract, if properly executed, is the "bounden contract" of the appellant; that the measure of damages is the difference between the rental value of the property *at the time of the alleged breach in April, 1909*, for the term, measured by the limitations in the lease, and the rent reserved for the entire term. That is, the rent reserved for the term was \$21,000; if the rental value of the property at the time of the breach in April, 1909, measured by the limitations in the lease, was less than \$21,000, the respondent may recover the difference; but the rental value for the full term must be fixed as of the time of the breach of the contract.

The motion for a new trial, however, should have been granted. The error in measuring damages from period to period pervades the entire record. The judgment is reversed, with directions to grant a new trial.

CROW, C. J., ELLIS, CHADWICK, and MAIN, JJ., concur.

[No. 11316. Department Two. December 31, 1913.]

IGNACIO SARTORI *et al.*, Respondents, v. DENNY-RENTON
CLAY & COAL COMPANY, Appellant.¹

BOUNDARIES—STREAMS—MEANDER LINES—EVIDENCE—SUFFICIENCY. Where the thread of a constantly changing stream was fixed as a boundary line at a certain date, the government meander lines, run many years before, do not control the boundary as against a subsequent survey and other evidence tending to show the location of the stream at the time it was fixed upon as the boundary line.

SAME—EVIDENCE—ACQUIESCENCE—AREA. Where a line, acquiesced in for some time, gives the true area of adjoining tracts, it is strong evidence of the true boundary line.

ACTIONS—JOINDER—EQUITY AND LAW—DAMAGES—JURISDICTION IN EQUITY. In an equitable suit to establish the thread of a stream as a boundary line, there may be joined a claim for damages for obstructing the stream, where objection is not raised below, and equity having acquired jurisdiction may grant full relief.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 6, 1913, upon findings in favor of the plaintiffs, in an action to establish a boundary line, and for damages. Affirmed.

Ballinger, Battle, Hulbert & Shorts and *Paul W. Houser*, for appellant.

Peters & Powell, for respondents.

MORRIS, J.—This is an action to establish the boundary line between the lands of the parties hereto, located upon opposite shores of Cedar river, not far from Renton, the respondents' lands being upon the north side and the appellant's upon the south side of the river. The contention of respondents was that the center line or thread of Cedar river, as it existed January 1, 1908, should be held to be the true boundary line; while appellant contended that the true boundary line should be fixed as the thread of Cedar river as it ex-

¹Reported in 137 Pac. 494.

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isted long prior to 1908, and as far back as 1865, when Cedar river was meandered, and that the thread of the stream as shown by these meander lines, except as modified by adverse possession, estoppel, and accretion, should now be held to be the true line.

In addition to praying for the establishment of the boundary line, respondents alleged that appellant was engaged in the manufacture of brick and clay products, and that for some years past it had deposited large quantities of earth and stone in the river and along the south bank, until it had filled in the natural channel of the river opposite respondents' lands to such an extent as to impede the natural flow of the river and deflect the force of the stream upon and against the lands of respondents upon the north bank; and, as a consequence thereof, during a period of high water in November, 1911, the waters of the river cut into and washed away the fertile surface soil of respondents' lands to the extent of eleven acres, causing damage in the sum of \$16,500. Issue was framed upon these contentions, and the case went to trial, resulting in a decree establishing the boundary line between the lands of appellant and respondents as the thread of Cedar river as found by a survey made in December, 1906; and as it was also found to exist for many years prior thereto. The decree also awarded respondents damages because of the acts of appellant in extending the south bank of the river, to the consequent injury of respondents' lands, in the sum of \$1,200. The decree fixed the course of the north and south banks of the river and the course of the thread of the stream; and further enjoined appellant from depositing earth, stone, or other material in the channel of the river, as defined by the courses fixed in the decree. From this decree, appeal has been taken.

There can be no dispute but that the thread of Cedar river was fixed as the true boundary line between the lands of appellant and respondents. The difficulty is in now determining where was Cedar river and where was the thread of the river at the time it was so fixed. In determining this ques-

tion, one might as well look for the proverbial needle in the haystack as to now attempt to fix this original boundary with any degree of certainty, due to the fact that Cedar river is a rapidly flowing mountain stream, having an average fall, where it passes through these lands, of twenty-seven feet to a mile, and has a bad habit of changing its location and flow and establishing a new channel every few years. A number of maps are in evidence showing the location of the stream in various years, from which it is apparent that the river has not followed the same courses for many successive years, and in a very few instances only do these maps show the course of the river within the meander lines of 1865. While, therefore, we must admit that the thread of the stream as originally established is the true boundary line between these lands, the difficulty, as before indicated, is in determining where that line now is; and after reading this record and studying the plats and exhibits, we confess a difficulty in arriving at a satisfactory conclusion.

The meander lines shown in the survey of 1865 are from 180 to 250 feet apart. The normal flow of the river is shown as from forty to ninety feet in width, so that, if it be assumed that the river was wholly within these meander lines in 1865, we are still in the dark as to where within these lines the thread of the stream would be. Ordinarily, meander lines are not intended nor recognized as boundary lines, but only as lines intended to indicate the sinuosities of the stream. It is, therefore, not unusual to find streams at places entirely without meander lines. As illustrating the difficulty of fixing the meander lines as bounding the stream, it is shown in this record that, in places within these meander lines, trees are growing to which witnesses ascribe a growth of from ten to sixty years. Many witnesses gave their opinion as to the location of the river in past years, but as these opinions were all based upon what each witness recalled as to the existence and location of certain land marks which are now obliterated, due in some instances to floods and high water and in others to changes

occasioned by the dumping of its waste material by appellant, the best the witnesses could do was to indicate where, in their judgment, the channel was at the time covered by their testimony. Necessarily there is a great conflict where witnesses attempt to point out or to indicate the location of a stream and its banks, when by reason of changes natural or otherwise it is impossible to indicate the location upon the ground, and such testimony cannot be otherwise than unsatisfactory and unreliable. The trial judge, realizing this, attempted to satisfy himself as to the location of this boundary line by making, in company with respective counsel, a personal examination of the location in question, and endeavored to trace and follow the different channels of the river as existing in various years, by means of soundings with a steel rod; and having done so, became convinced that the channel, as shown by the survey taken in 1906, was the channel which should be adopted as the true course of the river between the lands of appellant and respondents. There is abundant evidence in this record to establish this channel, which was surveyed before the fill complained of and before the obliteration of the south bank of the river, and at a time when there was at least some indicating evidence upon the ground as to the existence and course of the true channel. That this channel as shown by this survey existed in 1906, and for an indefinite period before that time, is, we think, well established by the evidence, and it conforms in many respects to a survey made by a grantor of appellant some time prior in which it was sought to determine the area included in the then ownership. This area as then found is approximately the same as found by the court in its decree, and the evidence is susceptible of a finding that it was conceded to be the true area as far back at least as 1898; and while such fact is not conclusive, it is strong evidence and entitled to great weight in cases of this kind when a line can be found that has for some time been acquiesced in as the true line.

We shall not attempt to answer all of appellant's attacks

upon the decree. We have gone over the record and attempted to follow the testimony as closely as it is possible to do when witnesses testify by reference to maps and plats; and having done so, we are satisfied that the lower court determined this boundary as accurately as it is now possible to determine it, and, not finding any preponderating evidence from which we can say the lower court was in error, we affirm the conclusion it has reached.

Upon the question of damages, appellant contends that, in actions of this character, it is not permissible to join a claim for damages. Appellant did not suggest this question until it made its argument to the court after the close of the evidence. It is clear that this is a suit in equity and, having obtained full jurisdiction, we think a court of equity can try out the whole controversy between the parties and afford such relief as it deems proper. The respondents stated their cause of action in their complaint and appellant answered thereto. The court was therefore authorized by both parties to try the issues thus made and to grant any relief embraced within these issues. We have frequently said that, in this state, the form of action is immaterial, and that in any action the court has power to try any question fairly within the issues submitted and to grant any relief warranted by the facts.

The judgment is affirmed.

CROW, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

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Citations of Counsel.

[No. 11511. Department Two. December 31, 1913.]

**HULET M. WELLS, *Appellant*, v. TIMES PRINTING COMPANY,
Respondent.¹**

LIBEL AND SLANDER—WORDS LIBELOUS PER SE—WHAT CONSTITUTES. Newspaper articles plainly intended to bring a person into public hatred, contempt, or ridicule, are libelous *per se*, although not attacking him in his business or profession, or charging him with an infamous crime.

SAME—WORDS LIBELOUS PER SE—SPECIAL DAMAGES—PLEADING—COMPLAINT—SUFFICIENCY. Newspaper articles are libelous *per se* without alleging special damages, where they falsely and maliciously charge plaintiff with the violation of a statute defining the public desecration or disrespect of the United States flag, and calls him a "redtinted agitator" voicing "constructive sedition and treason" and wantonly "insulting the symbol of patriotic allegiance," and declaring that there was a public clamor for his prosecution; and the complaint in such case requires no innuendo to construe the same as intending to bring him into public hatred, contempt and ridicule.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 8, 1913, dismissing an action for libel, upon sustaining a demurrer to the complaint. Reversed.

Roney & Loveless, for appellant, contending, among other things, that the publication was libelous *per se*, cited: 25 Cyc. 250; 18 Am. & Eng. Ency. Law (2d ed.), 909-912; *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772; *Lewis v. Daily News Co.*, 81 Md. 466, 32 Atl. 246, 29 L. R. A. 59; *Cerveny v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864; *Street v. Johnson*, 80 Wis. 455, 50 N. W. 395, 27 Am. St. 42, 14 L. R. A. 203; *McAllister v. Detroit Free Press*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. 318; *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713, 21 Am. St. 358; *Morey v. Morning Journal Ass'n*, 123 N. Y. 207, 25 N. E. 161, 20 Am. St. 730, 9 L. R. A. 621; *Price v. Conway*, 134 Pa. St. 340, 19 Atl. 687, 19 Am. St. 704, 8 L. R. A. 193;

¹Reported in 137 Pac. 457.

World Pub. Co. v. Mullen, 43 Neb. 126, 61 N. W. 108, 47 Am. St. 737; *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. 636; *Wood v. Boyle*, 177 Pa. St. 620, 35 Atl. 853, 55 Am. St. 747; *Wilkes v. Shields*, 62 Minn. 426, 64 N. W. 921; *McMurry v. Martin*, 26 Mo. App. 437; *Massuere v. Dickens*, 70 Wis. 83, 35 N. W. 349; *Moley v. Barager*, 77 Wis. 43, 45 N. W. 1082; *Allen v. News Pub. Co.*, 81 Wis. 120, 50 N. W. 1093; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111; *Goldborough v. Oram & Johnson*, 103 Md. 671, 64 Atl. 36; *Stewart v. Swift Specific Co.*, 76 Ga. 280, 2 Am. St. 40; *Augusta Evening News v. Bradford*, 91 Ga. 494, 17 S. E. 612, 44 Am. St. 53, 20 L. R. A. 533; *Smith v. Smith*, 73 Mich. 445, 41 N. W. 499, 16 Am. St. 594, 3 L. R. A. 52; *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215, 107 Am. St. 416; *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. 810, 8 L. R. A. 214; *Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 596, 65 Am. St. 54; *Trebby v. Transcript Pub. Co.*, 74 Minn. 84, 76 N. W. 961, 73 Am. St. 330; *Triggs v. Sun Printing & Pub. Ass'n*, 179 N. Y. 144, 71 N. E. 739, 103 Am. St. 841, 66 L. R. A. 612; *Upton v. Hume*, 24 Ore. 420, 33 Pac. 810, 41 Am. St. 863, 21 L. R. A. 493; *McDuff v. Detroit Evening Journal*, 84 Mich. 1, 47 N. W. 671, 22 Am. St. 673; *Wofford v. Meeks*, 129 Ala. 349, 30 South. 625, 87 Am. St. 66, 55 L. R. A. 214. An article may be libelous *per se* without attacking the person in his business or profession. *Upton v. Times-Democrat Pub. Co.*, 104 La. 141, 23 South. 970; *Flood v. Evening Post Pub. Co.*, 71 S. C. 122, 50 S. E. 641; *Morey v. Morning Journal Ass'n*, 123 N. Y. 207, 25 N. E. 161, 20 Am. St. 730, 9 L. R. A. 621; *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. 810, 8 L. R. A. 214; *Triggs v. Sun Printing Pub. Ass'n*, 179 N. Y. 144, 71 N. E. 739, 103 Am. St. 841, 66 L. R. A. 612; *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381; *Elmergreen v. Horn*, 115 Wis. 385, 91 N. W. 973; *White v. Nichols*, 44 U. S. 3; *Lewis v. Daily News Co.*, 81 Md. 466, 32 Atl.

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246, 29 L. R. A. 59; *Cervený v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864; *Wilkes v. Shields*, 62 Minn. 426, 64 N. W. 921; *Call v. Larabee*, 60 Iowa 212, 14 N. W. 237; *Buckstaff v. Viall*, 84 Wis. 129, 54 N. W. 111.

Bausman & Kelleher, for respondent, contended, *inter alia*, that there was no direct accusation against the plaintiff, and the words were not libelous *per se*: *Wright v. Daniel*, 40 Wash. 6, 82 Pac. 139; *Dunlap v. Sundberg*, 55 Wash. 609, 104 Pac. 830, 133 Am. St. 1050; *McClure v. Review Pub. Co.*, 38 Wash. 160, 80 Pac. 303; *De Fronsac v. News Co. (R. I.)*, 35 Atl. 1046; *Diener v. Star-Chronicle Pub. Co.*, 232 Mo. 416, 135 S. W. 6; *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772; *Stone v. Cooper*, 2 Denio (N. Y.) 293; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876; *Ulery v. Chicago Live Stock Exchange*, 54 Ill. App. 233; *Clarke v. Fitch*, 41 Cal. 472; *Goldberger v. Philadelphia Grocer Pub. Co.*, 42 Fed. 42; *Galveston Tribune v. Guisti* (Tex. Civ. App.), 134 S. W. 239.

MORRIS, J.—Appellant brought an action against respondent, charging it with libel in publishing certain articles of and concerning him. In the second amended complaint, three causes of action, based upon three publications, were set forth. These articles were set forth in full as published, to which was added an allegation that they were wholly false and maliciously published for the purpose of injuring appellant in his reputation and to expose him to public hatred, contempt, ridicule, and disgrace. A demurrer was interposed to this complaint, which was sustained upon the ground that the articles complained of were not libelous *per se*, appellant having failed to charge any special damage. Appellant electing to stand upon his second amended complaint, judgment of dismissal was entered, and he appeals.

These articles were as follows:

(1) "DENOUNCING FLAG AS DIRTY RAG MAY COST WELLS
CITIZENSHIP.

"CHIEF EXAMINER OF NATURALIZATION BUREAU TAKES UP
ALLEGED STATEMENTS OF SOCIALIST MAYORALTY
CANDIDATE.

"Having heard that Hulet M. Wells, candidate for the mayoralty on the Socialist ticket at the last municipal election, and at present a civil service employee of the city in the lighting plant, had been reported to say this morning that the Stars and Stripes was a dirty rag, and that his sympathies were all with the paraders of last evening, proceedings were begun today by Chief Examiner John Speed Smith, of the government naturalization bureau, to revoke his rights of citizenship, if it can be shown he is not a native born citizen.

"Following close upon the declaration of fellow employees that he had made life almost unbearable at the lighting plant during the recent agitation over the red flag and that today, particularly, he had made numerous vicious statements concerning government and respect for law, formal complaint was registered with the naturalization bureau and investigation into his record begun.

"Complaints were registered both with the naturalization bureau and with the office of the United States marshal. After the evidence had been transferred to a special agent of the department of justice, he laid it before Chief Examiner Smith, with recommendation that Wells be prosecuted if it be found that the statements actually had been made by him.

"It is feared by the government that it will be impossible to reach him through the federal courts, inasmuch as it is believed that he is a native-born citizen. In that case it will be necessary to take the case into the state courts.

"Naturalization can only be revoked when an alien has been found guilty of sedition at the time he took his oath of allegiance, and no American-born citizen can be attacked in this way for expounding treasonable views.

"In case it is found that he is a native-born, the evidence will be referred to Prosecuting Attorney John F. Murphy, with request on the part of the government that he be prosecuted by the state. Such action could be taken under the statute prohibiting insults to the Stars and Stripes.

"Wells at one time was a civil service employee of the

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United States in the postoffice. He is also known to have been at one time a student of the State University. At present he is under civil service working for the city; and if necessary to reach him, formal complaint against him will be made to the Civil Service Commission by the government."

(2) "NEEDED EVIDENCE SUPPLIED MURPHY.

"Hulet M. Wells, one-time candidate for the mayoralty on the Socialist ticket, former student at the State University and later employed for a time in the Seattle postoffice, will be the first to be prosecuted by the state for public disrespect of the American flag, if Prosecuting Attorney John Murphy fulfills his pledge to the people of Seattle, made Friday afternoon.

"Names of two witnesses, fellow-employees of Wells, at the municipal lighting plant, who informed government officials Thursday of last week that his insults towards the flag had become unbearable, were obtained yesterday by Secretary Robert McCormick of the Spanish War Veterans in this city, and will be turned over to the prosecuting attorney tomorrow.

"This will be done in accordance with the request of Mr. Murphy to the veterans that all tangible evidence as to public acts against the American Flag be given to him for examination and prosecution. This request was conveyed in an interview between Murphy and McCormick Friday afternoon.

"At the time the matter was reported to United States Marshal J. R. H. Jacoby, and later to the department of justice and the government naturalization bureau, the employees stated that Wells had called the flag a 'dirty rag,' and that his taunts had become more than they could endure peaceably.

"The matter was immediately taken up by Chief Examiner John Speed Smith of the naturalization bureau, in order to deprive Wells, if possible, of his citizenship; but it was found that he had been born in Skagit county, and, being native-born, is therefore beyond the reach of the United States officers so far as revocation of citizenship is concerned.

"The statute under which prosecution may be carried forward defines the public desecration or disrespect of the Stars and Stripes as a misdemeanor. The law was put into effect in 1909, and so far as is known has never been made the basis of prosecution in King county before."

(3) "\$10,000 SUIT BROUGHT AGAINST TIMES BY MAN
WHO REVEILED U. S. FLAG.

"HULET M. WELLS, WHO DENOUNCED OLD GLORY AS 'DIRTY
RAG' PEEVED BY NEWS ARTICLES IN THIS PAPER.

"In an effort to capitalize notoriety achieved through revilement of the American flag, Hulet M. Wells, redtinted agitator and whilom socialist, yesterday brought suit against the Times Publishing Company for \$10,000, in which amount, he represents, he was damaged by news stories published in this newspaper. One of these published May 2 of this year, is headed 'Denouncing the Flag as Dirty Rag May Cost Wells Citizenship.' The other, published May 5, headed: 'Wells May Be First to Face Local Jury for Insulting Flag.' Both these articles Wells charges constitute libel.

"The incident responsible for the suit came up at the time The Times expressing the sentiment of an outraged American citizenship against I. W. W. outrages, and constructive sedition and treason, voiced in the rantings of characters of the Wells stripe, turned a drenching stream of publicity upon the fire of incipient revolution. This newspaper vigorously attacked the sources responsible for the menace to the city's and country's well being, and by confining the flames to the narrow confines of their origin and maintaining a relentless warfare upon them, stamped out the whole movement.

"The I. W. W. element was virtually kicked out of town through sheer force of public sentiment. A few of the Wells ilk and other opportunists seeking reputations as radical agitators took advantage of the opportunity to obtain some of the yellow publicity so important to the success of efforts to win leadership in the rag-tag forces they lead. They jumped into the fray and elbowed the I. W. W.'s aside so that some of the newspaper flaying might descend upon their own shoulders.

"Wells, in particular, made a spectacular show of himself. He outranted the I. W. W.'s and leaped beyond the last border of unloyalty and indecency they had established by denouncing Old Glory as a 'dirty rag.'

"This despicable act brought a cry of protest from all quarters, and citizens urged federal and county authorities to invoke criminal laws against him.

"The Times printed the truth about the whole nasty affair, handling Wells without gloves.

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"In the complaint of his suit, Wells declares the publications were 'malicious and with the purpose of injuring plaintiff, exposing him to hatred and contempt of the people, and depriving him of the benefit of public confidence and social intercourse and bringing him into disrepute among his friends and neighbors and with others of the social organization and party and the people at large of the city of Seattle and the state of Washington.'

"SOME POINTS MISSING.

"The people' to whom Wells refers in his complaint, with inconsiderable exception, are Americans, every one of whom loves, honors and respects the Stars and Stripes. How Wells possibly could figure that he possessed any 'public confidence' of these people which he might be deprived of, after he had wantonly insulted the symbol of a patriotic allegiance they treasured above all else, is not set forth.

"Among interesting observations of the complaint's preamble—interesting when the truth about the crooks and turns of the Wells character is known—are his declarations that he 'holds a prominent and influential place in the Socialist party.' As a matter of fact, the most active agents in the discrediting and denunciation of Wells at the present time are members of the Socialist party. They claim that he has been kicked out of the regular ranks of their organization.

"The two articles that Wells is using as the basis of his suit are republished in full herewith. The first publication in the Times of May 2, 1912, under the heading, 'Denouncing Flag as Dirty Rag May Cost Wells Citizenship.' " (Here follow the first and second articles as above quoted.)

The respondent, by its demurrer, admitting the false and malicious character of the publications, it only remains for us to decide whether or not, in the absence of a plea of special damage, the words so published are actionable as libelous *per se*. In *Quinn v. Review Pub. Co.*, 55 Wash. 69, 104 Pac. 181, 133 Am. St. 1016, matter libelous *per se* is defined as any publication which falsely and maliciously tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society, including whatever tends to injure the character of an individual or blacken his

reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse. In *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381, in defining matter libelous *per se*, it is said it is enough if the words are of such a nature that the court can presume as a matter of law that they will tend to disgrace the party of whom they are published, or hold him up to public ridicule or contempt, or, cause him to be shunned or avoided. In *Triggs v. Sun Printing & Pub. Ass'n*, 179 N. Y. 144, 71 N. E. 789, 108 Am. St. 841, 66 L. R. A. 612, it is said any publication which exposes another to public hatred, contempt, scorn, obloquy, or shame, is libelous *per se*. In *Riley v. Lee*, 11 Ky. Law 586, 11 S. W. 713, matter libelous *per se* is said to be that which tends to render an individual odious, ridiculous, or contemptible in the estimation of the public, or brings him into public disgrace. Other citations will not be necessary to establish the correctness of these definitions. They are too well established in the law and have been recognized too long to be now doubted or questioned.

We come, therefore, to the main question submitted by this appeal, Do these several publications, as set forth in this second amended complaint, fall within the rule stated? And in answering this question in the affirmative, we confess our inability to understand the reasoning which holds they do not; for it seems to us these publications are so plainly libelous *per se* as to admit of no question. Respondent supports the ruling on the demurrer by contending, that in none of the articles is there any direct accusation against appellant; that they merely purport to be the theories and proceedings of agents of the Federal government, in stating that certain things had been reported and that an investigation was to be made and, if upon such investigation these reports were found to be true, certain proceedings might be had; and it is also contended that (1) there is no attack upon appellant in his business or profession, and (2) no charge against him of

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having committed an infamous crime. No case is cited, and we are confident none can be found, restricting matter libelous *per se* within these two last limitations. It might be that, if there was no allegation of express malice, the language of the first two articles might be construed as the publication of a news item, as what was contemplated by the public officials and the ground for their proposed action, and thus bring the case within the rule of *McClure v. Review Pub. Co.*, 38 Wash. 160, 80 Pac. 808, in which the article there published was held to be not libelous *per se* because of its lack of statement of whether or not the plaintiff was guilty of the crime with which she was charged, and purported only to be a statement of the acts and representations of the peace officers in relation to the pursuit, arrest, trial, and acquittal of the plaintiff; it being there said that, while certain of the expressions there used, if construed without reference to the whole publication, might be held to be libelous *per se*, yet when read as a whole, there being no charge of malice nor anything in the articles themselves or in the circumstances surrounding the publication to indicate malice, the libelous character of the publication could not be established.

It will not be necessary to here determine whether, as applied to these first two publications if standing alone, this rule could be invoked to sustain the demurrer, for the publication of the third article with the reproduction of the first two, and its evident purpose and intent as plainly indicated as it is possible for language to express, robs the *McClure* case of any application to the question before us. For in this third publication, as distinguished from the *McClure* case, is found a direct charge of guilt of the offense referred to in the second publication. Not only referred to, but the second publication goes further, in giving the names of the witnesses by whom the offense can be established, and making special reference to the statute which defines it to be a crime. Whatever then may have been the purpose of the first two articles, the third is a direct personal charge

against appellant as a "man who reviled U. S. flag," "who denounced Old Glory as a dirty rag," a "redtinted agitator," voicing "constructive sedition and treason," leaping "beyond the last border of unloyalty and indecency" by "denouncing Old Glory as a dirty rag," and "wantonly insulted the symbol of a patriotic allegiance." Such language requires no innuendo to construe its meaning as intending to bring the individual of whom it is written into public hatred, contempt, and ridicule, expose him to public obloquy, scorn, and shame, and cause him to be shunned and avoided by his fellows. The third article leaves no room for any doubt as to its purpose to so characterize the appellant and his acts and the effect produced upon the public mind; for it says, "This despicable act brought a cry of protest from all quarters and citizens urged Federal and county authorities to invoke the criminal laws against him." What else need be said as to the effect upon the public mind of the publications complained of, when the publication itself refers to the public as so inflamed against appellant that citizens from all quarters urged the public authorities to invoke the criminal laws against him, thus not leaving to inference or presumption that the ordinary effect of the language used in the publications would hold appellant up to public hatred, contempt, scorn, and shame; but expressly charging that appellant was so regarded to the extent of a public demand that criminal laws be invoked against him.

Respondent justifies the judgment further by referring to *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747, where it was said that to call one a hog is not libelous *per se*, as such language does not expose the one of whom it was spoken "to public hatred or contempt in the sense or to the degree required by the law of libel." There is no comparison between the language used in the *Urban* case and that used in the articles under discussion, and conceding that that case binds us to the rule there announced as applicable to the language there used, we cannot extend such immunity to the language

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here used. Nor is *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876, also relied upon by respondent, an authority for its contention. The language there used was: "You will kindly excuse delay, caused by one Velikanje presenting us with forged receipts purporting to be from our agent at your city, and trying to collect your money on them." It was held that this language did not charge the crime of forgery or of uttering a forged instrument, because it imputed neither criminal intent nor guilty knowledge. It is evident that the meaning of the language there used is that one can innocently make use of a forged instrument, and the mere fact of use does not imply that the use was made with a guilty knowledge of the character of the paper, nor with the intent to commit a crime; nor would the law presume guilty knowledge or criminal intent in the absence of any language from which it could be legally inferred. As applied to the case before us, that rule would mean that we will not presume the language used in these articles complained of has a tendency to so expose plaintiff to public ridicule, contempt, hatred, scorn, and shame as to make them libelous *per se* in the absence of language plainly indicating such tendency, or when the words used could be so used without any such effect. It is possible to pass a forged instrument without criminal intent or guilty knowledge, but it is not possible to use the language here complained of without subjecting the one of whom it is written to public hatred, contempt, and scorn, or avoiding the belief that such was the very purpose of the publication. And herein lies the manifest distinction between the two cases.

If we are to decide the question before us with reference alone to our own decisions, without any reliance upon the legal principles involved, reference might be made to *Bryne v. Funk*, 38 Wash. 506, 80 Pac. 772, where it was held that a publication calling a county commissioner "a liar and poltroon" was libelous *per se*. Also *Quinn v. Review Pub. Co.*, *supra*, where an article charging one with being party to a system of municipal jobbery and graft was held libelous *per*

se; and *Lathrop v. Sundberg, supra*, where a letter insinuating that a physician was not a reputable physician and classing him with criminal practitioners, patent medicine fakirs, and quacks, was held actionable without any charge of special damage. True, in each of those cases it might be said the charge was made concerning an individual in his official or professional capacity, and that words so used might be held to be libelous *per se* when they would not be so held if written of one in his individual capacity. Conceding such a rule, those cases more than support our view that the language here used is actionable without allegation or proof of special damages. We cannot escape the conviction that the respondent's demurrer should have been overruled. The judgment is reversed.

CROW, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 11098. Department Two. December 31, 1913.]

FRED W. NEWELL *et al.*, Respondents, v. SAMUEL S. LOEB *et al.*, Appellants, PHILLIP ABNEY *et al.*, Defendants.¹

EMINENT DOMAIN — WATERWAYS — PROCEEDINGS — JURY TRIAL — CHALLENGES. In a special proceeding to establish a waterway district, all the defendants must join in peremptory challenges to jurors, since the special law does not provide for peremptory challenges, and the general statutes require all defendants to join.

SAME — COMPENSATION — NAVIGABLE WATERS — DIVERSION — RIGHTS OF RIPARIAN OWNERS. The state being the owner of the beds of navigable rivers, under the constitutional assertion of art. 17, § 1, riparian owners are not, in eminent domain proceedings to establish a waterway district, entitled to damages from the fact that the state will divert the course of the stream and leave their property without access to the water.

SAME — BENEFITS — ASSESSMENT — DETERMINATION — PROCEEDINGS. 3 Rem. & Bal. Code, § 8177-2, requiring the jury to find the maximum amount of benefits from the establishment of a waterway district, merely fixes a basis for and limitations upon the assessment to be

¹Reported in 137 Pac. 811.

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made later, and hence is not objectionable in that the amount of benefits found greatly exceed the cost of the improvement.

EVIDENCE—EXPERTS—OPINIONS—VALUE. Where expert witnesses on land values qualified on direct examination, their testimony was competent, lack of qualifications disclosed on cross-examination going only to the weight of the evidence.

EMINENT DOMAIN—PROCEEDINGS—INSTRUCTIONS—EFFECT OF VIEW. In eminent domain proceedings, an instruction to the jury on the subject of their view of the premises, properly stating the effect thereof in weighing and applying the evidence, is not erroneous in that the jury were told that "what they see they know."

SAME—PROCEEDINGS—APPEAL—REVIEW—VERDICT. In eminent domain proceedings to establish a waterway district, the jury's verdict as to the amount of benefits will not be disturbed where supported by evidence, although the same was strongly contradicted.

EMINENT DOMAIN—PROPERTY SUBJECT—PROPERTY DEVOTED TO PUBLIC USE. The property of a public service corporation, already devoted to a public use, may be acquired by condemnation in the establishment of a waterway district, under 3 Rem. & Bal. Code, § 8172a, subd. "a" providing that private property and the property of private corporations may be condemned when necessary to make the improvements, and Id., subd. "d," providing for the condemnation of all necessary and needed rights of way in the straightening or improving of the river.

BOUNDARIES—NAVIGABLE STREAMS. A deed according to recorded plats conveys the land only to the bank of the river, where the boundaries in the plat ran "to the right bank" of the river, and "thence up stream with the meanders" etc.

NAVIGABLE WATERS—RIPARIAN RIGHTS—DIVERSION OF WATERS BY STATE—EMINENT DOMAIN—COMPENSATION. Riparian owners have no rights in the bed of a navigable stream, beyond their boundaries, and no rights in the waters of the river as against the state or its agency; hence a riparian owner is not entitled to recover damages from the establishment of a waterway district by reason of the diversion of the water and being compelled to procure a supply of water elsewhere.

EMINENT DOMAIN—WATERWAY DISTRICTS—PROCEEDINGS—JURY TRIAL—BENEFITS—DETERMINATION. Upon the assessment of benefits by a jury in a condemnation proceeding to establish a waterway district, in which there are thousands of party defendants, it is not error to permit the estimates of the witnesses to be taken by the jury to the jury room, under instructions that they were but aids to their recollection of the testimony and not to be considered as evidence.

SAME—PROCEEDINGS—ASSESSMENTS—BENEFITS—SEPARATE TRIALS. 3 Rem. & Bal. Code, § 8166a *et seq.*, providing for the establishment of waterway districts, does not authorize separate trials upon the question of the maximum benefits to the property in the district.

SAME—ASSESSMENT OF BENEFITS—RAILROAD PROPERTY. The fact that a railroad right of way is at present being used exclusively for railroad purposes is no objection to its assessment for benefits from the establishment of a waterway district.

SAME—ASSESSMENT OF BENEFITS—DETERMINATION. Under 3 Rem. & Bal. Code, § 8177-2, requiring the jury in condemnation proceedings to establish a waterway district, to find the maximum amount of benefits per acre or per lot, the jury must determine the maximum benefits to platted and unplatted property at the time of the trial; hence cannot make deductions for streets that might be platted in the future.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered December 14, 1912, upon verdicts of a jury awarding damages and assessing benefits in condemnation proceedings to establish a waterway district. Affirmed.

Richard Saxe Jones, for appellants Loeb and Moyses, contended, *inter alia*, that appellants were deprived of their right to a jury trial in being deprived of their peremptory challenges. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285; *Times Pub. Co. v. Carlisle Journal Co.*, 94 Fed. 762; *Betts v. United States*, 132 Fed. 228; *Proprietors of Mills etc. v. Inhabitants of Randolph etc.*, 157 Mass. 345, 32 N. E. 153. The power and authority of the Federal government over navigable waters is expressly limited to a sovereign power of regulation for the purpose of navigation. 2 Blackstone, Commentaries (4th ed.), p. 18; *Sweet v. Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349. All title and power of control by the State of Washington over the beds and waters of a navigable stream comes from a transfer of that power from the United States government and is not in any degree greater than the

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Citations of Counsel.

rights of the United States government, itself, and is therefore simply a sovereign power of regulation for the purposes of navigation; and the proprietary rights of riparian owners are *jure natura*, subject, however, to the sovereign control. *Union Depot etc. Co. v. Brunswick*, 81 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *Hobart v. Hall*, 174 Fed. 493; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Rumsey v. New York & N. E. R. Co.*, 133 N. Y. 79, 30 N. E. 654, 28 Am. St. 600, 15 L. R. A. 618.

James B. Howe and *Hugh A. Tait*, for appellants Puget Sound Traction, Light & Power Company *et al.*, contended, among other things, that the traction company's property and property rights are already devoted to a public use, and cannot therefore be condemned or taken for another such use. 15 Cyc. 567; *Lewis*, Eminent Domain (3d ed.), § 440; *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637; *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199; *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25; *Seattle v. Fidelity Trust Co.*, 22 Wash. 154, 60 Pac. 133; *State ex rel. Postal Tel. Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855; *State ex rel. Wauconda Inv. Co. v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913 E. 1076. Title to property on a navigable body of water extends to the meander line, if the meander line is below the line of ordinary high water. *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726; *Cogswell v. Forrest*, 14 Wash. 1, 43 Pac. 1098; *Washougal & LaCamas Transp. Co. v. Dalles, Portland & A. Nav. Co.*, 27 Wash. 490, 68 Pac. 74; *Jones v. Callvert*, 32 Wash. 610, 73 Pac. 701; *Kneeland v. Kortor*, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. (N. S.) 745. The title of the traction company to its property extends below the line of ordinary high water and into the bed of the river,

and it has the right to have the water flow in its customary volume and manner over that part of the bed of the river which it owns, and it cannot be lawfully deprived of such right without first being compensated for the damage suffered thereby. *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; *Madson v. Spokane Valley Land etc. Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 5.

Ira Bronson (Gay & Kellerman, of counsel), for appellants Macaulay *et al.*, contended, among other things, that the unconstitutionality of the law lies in the fact that there is a judgment against the land for the amount of the difference between two million dollars and \$850,000; to the extent of such excess the property of these appellants and others is taken without due process of law; it is taken without warrant or justification. Page and Jones, Taxation by Assessment, § 466; *Davis v. Litchfield*, 145 Ill. 313, 33 N. E. 888, 21 L. R. A. 563; *Union Bldg. Ass'n v. Chicago*, 61 Ill. 439; *State ex rel. Lingenfelter v. Danville & North Salem Gravel Road Co.*, 33 Ind. 133; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Eno v. Mayor etc. of New York*, 68 N. Y. 214; *Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800; *In re Mill Creek Sewer*, 196 Pa. St. 183, 46 Atl. 312; *Ankeny v. Palmer*, 20 Minn. 477. The property owner is given no right to be heard either as to the amount which may be charged against the property, or as to the equalized amount to be charged; the jury did not make the assessment, and the property owner is given no day in court upon an assessment on any question, except that of maximum benefits, which is not sufficient. Page and Jones, Taxation by Assessment, § 119; *Norwood v. Baker*, 172 U. S. 269; *Anderson v. Messenger*, 158 Fed. 250; *Fay v. Springfield*, 94 Fed. 409; *Murdock v. Cincinnati*, 39 Fed. 891; *Scott v. Toledo*, 36 Fed. 385; *Lower Kings River Reclamation Dis-*

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trict No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335; *Hutson v. Woodbridge Protection District*, 79 Cal. 90, 16 Pac. 549, 21 Pac. 435; *Boorman v. Santa Barbara*, 65 Cal. 313, 4 Pac. 31; *Brown v. Denver*, 7 Colo. 305; *Allman v. District of Columbia*, 3 App. D. C. 8.

Hughes, McMicken, Dovell & Ramsey, for appellant Puget Mill Company.

Turner & Hartge, Carkeek, McDonald & Kapp, Preston & Thorgrimson, and *Jay C. Allen*, for appellants *Rines et al.*

Farrell, Kane & Stratton, for appellant Columbia & Puget Sound Railroad Company.

Shorett, McLaren & Shorett, for respondents.

MOUNT, J.—This is an eminent domain and special assessment proceeding, prosecuted by the commissioners of Waterway District No. 1, of King county, Washington, under the provisions of ch. 11, Laws 1911, p. 11 (3 Rem. & Bal. Code, § 8166a *et seq.*), for the purpose of acquiring the right of way for the straightening and deepening of the channel of the Duwamish river, in King county. Thirteen thousand parties are named as defendants. Against some of these defendants, it is sought to take certain of their property for the right of way. Against others, it is sought to determine the maximum special benefits to the property within the district.

The action was tried to a jury selected under the provisions of the act above referred to. Verdicts were returned in favor of the defendants whose property was taken and damaged. A verdict was also returned finding the maximum benefits to all other property within the district. Certain of these defendants have appealed from portions of the judgment affecting them. There are a number of appellants, presenting six different appeals, all presenting certain questions in common; and some, presenting questions applicable only to themselves. We shall notice the errors assigned in their order.

The facts upon which assignments of error are based will be hereafter stated sufficiently to raise the questions presented.

The object of the improvement sought to be made by the commissioners is to straighten the channel of the Duwamish river between the termini of the district. The Duwamish river, as it runs through this district, makes certain bends. The length of the river between the termini of the district in its natural condition is nearly ten miles. Nearly half of this distance is obviated by the proposed improvement. In straightening the river, it is the purpose of the commissioners to obviate the bends in the natural channel by cutting a new channel from one bend in the river to the next nearest bend. One of these bends, known as the "Ox Bow Bend," is in the shape of a letter "U." The appellants Loeb and Moyses own property upon the shore of the river as it flows in its natural state which will be left by the improvement one-half mile away from the new channel of the river. The river flows in a northwesterly direction. It is proposed to put a dam across the natural channel at its southerly end near the artificial channel, and thus prevent fresh water from flowing down the natural channel by the property of Loeb and Moyses. The same is also true of other bends.

The object of the action is to determine, first, the damages or compensation for the property taken, together with the estimated cost of the whole improvement; and second, to determine the maximum amount of benefits which will be derived from the improvement and which will inure to the property within the district. The act upon which the proceeding is prosecuted provides, at § 26, that

"In case the damages or amount of compensation for such property, together with the estimated costs of the improvement, amount to more than the maximum amount of benefits which will be derived from said improvement, or if said improvement is not practicable, or will not be conducive to the public health, sanitation, welfare and convenience, or will not increase the public revenue, the court shall dismiss such proceedings." § Rem. & Bal. Code, §8190a.

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The act also provides, at § 14 (Id., § 8177-2), that, if the court shall be satisfied by competent proof that the improvement is practicable and conducive to the public health, etc., and that the contemplated use is really a public use, and that the lands sought to be appropriated are necessary for the establishment of the improvement, the court shall call a jury of twelve persons to be impaneled to fix the compensation and to assess the damages and benefits; that the jurors at such trial shall make in each case a separate assessment of the damages which shall result to any person, corporation or company, or to the state, by reason of the appropriation and use of the lands for said improvement, and shall ascertain the amount of damages to be paid to said owners respectively; and that the jury shall further find the maximum amount of benefits per acre or per lot or tract to be derived by each landowner.

After an adjudication by the court to the effect that the improvement was practicable, etc., and that the contemplated use for which the property sought to be taken was really a public use, a writ of certiorari was prosecuted to this court and certain constitutional objections were therein raised. See *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791. Prior to that time, a writ was prosecuted to this court from the order of the county commissioners authorizing the organization of the district. See *State ex rel. Bussell v. Abraham*, 64 Wash. 621, 117 Pac. 501. In these cases we reviewed most of the constitutional questions which are now sought to be relitigated upon this appeal. We shall therefore not notice those questions at this time.

This case is like the case of *Commissioners Commercial Waterway District No. 2 etc. v. Seattle Factory Sites Co.*, 76 Wash. 181, 135 Pac. 1042. In that case a proceeding was prosecuted in the same manner and for the same purposes that this proceeding is prosecuted. We there set out the principal features of the act of 1911 under which this proceeding was prosecuted, and we refer to that decision

without again restating the provisions of the act, except as the same may be necessary to a clear understanding of the questions decided herein.

All of the appellants in this proceeding objected to the manner of calling and impaneling the jury, and base error thereon. It appears that, when the case was called for trial upon the questions hereinbefore stated, the court selected one jury to try the question of damages to the property taken, and also to assess the maximum benefits to the lands within the district. The appellants insisted that they were each entitled to separate juries and that they were not required to join in the peremptory challenge. By referring to the act, it will be seen that it provides for one jury to try these questions. It also provides that each person whose property is taken or damaged, and each person whose property is liable to assessment within the district, shall be made a party defendant. In other words, the statute provides for a special proceeding in these cases. The jury was required to, and did in this case, try out separately each case where property was taken or damaged. But as to the property specially benefited, all were tried together. The statute makes the case one case and provides for one jury to try the questions to be determined. There is no provision in the act with reference to peremptory challenge. Assuming, however, that the general statute governs in this case by reason of the fact that no special provision is made for such challenges, it is plain that it was not error when the court required the defendants to join in the challenge, because the statute makes the action one action. Even if the general statute with reference to challenges applies, it was necessary for all the defendants to join in the challenge. In *Manhattan Building Co. v. Seattle*, 52 Wash. 226, 100 Pac. 330, we said:

"The assignment based upon the fact that the defendants were required to join in their peremptory challenges is not well founded. The section of the statute providing for peremptory challenges (Bal. Code, § 4979; P. C. § 593), pro-

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vides that when there are several parties on either side, they shall join in a challenge before it can be made. Construing this section we have held that defendants representing conflicting interests and appearing separately must join in a challenge before it can be allowed."

It follows, therefore, if this proceeding is a special one, no provision being made for peremptory challenges, no error can be based upon the fact that none were allowed. If the general statute applies, it was not error to deny the peremptory challenge unless all joined therein. •

The appellants Loeb and Moyses requested the court to give an instruction to the effect that persons owning property upon a navigable stream have the right to the use of that stream for the purposes of approach, the construction of wharves, docks, and for all the usual purposes of navigation; and that, if the jury should find that either of such purposes would be lost as to Loeb and Moyses by reason of the improvement contemplated, the jury might consider such fact in determining the amount of damages. The court refused this instruction, but gave an instruction to the effect that the jury should not take into consideration the fact that the main channel of the Duwamish river might be diverted by reason of the improvement, and that the state or its subsidiary corporation, the waterway district, might claim the bed of the river as a diverted stream.

The waterway district was not seeking to take any of the property of these appellants. But it is claimed by them that, because the channel of the Duwamish river was changed at the Ox Bow bend so as to leave the property of these appellants one-half mile from the new channel, this was a damaging of their property on account of which they are entitled to be compensated. It is conceded in the case that the Duwamish river is a navigable river. These instructions raise the question, which is presented here by the appellants, whether the state takes title to the bed of navigable rivers

or whether, when the bed of the river is changed or reclaimed, the title to the bed belongs to the adjoining owners.

There are many conflicting opinions upon this question. But we think it is set at rest in this state by many decisions heretofore rendered. The constitution of this state, at § 1, of article 17, declares, that the state asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all rivers and lakes. In *Shively v. Bowlby*, 152 U. S. 1, it is said:

“The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another.”

In *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267, this court said:

“Legislation has proceeded upon one of two theories with reference to tide and shore lands. The one, that the state will recognize a riparian right in the upland owner and compel the public to subordinate its rights (except as to navigation) to his convenience. The other is that the title to all tide and shore lands is in the state, and may be sold, leased, or otherwise disposed of in aid of business and commerce, and without reference to the comfort and convenience of the upland owner. This state has asserted the latter doctrine. It will thus be seen that the case involves primarily the question of state policy. The state has a right to deal with its own property as its own. There is, therefore, no Federal question involved.”

See, also, *Bilger v. State*, 63 Wash. 457, 116 Pac. 19; *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59; *State ex*

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rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945. In the case last cited, after reviewing the question as to the right of an upland owner to take water from a navigable lake, we said:

"No decision of this court has come to our notice dealing directly with a claim of water for irrigation made by an upland owner by reason of such land bordering upon navigable water; but it seems to us that our constitutional declaration of ownership, and former decisions touching the effect of that declaration, are clearly opposed to the contention that an upland owner can make lawful claim to the use of navigable water upon which his land borders, and rest such claim solely upon the ground that he has a common law right in such water by reason of his land bordering thereon, as against the state or one who appropriates such water in pursuance of the laws of the state."

And in *Commissioners Commercial Waterway District No. 2 etc. v. Seattle Factory Sites Co.*, *supra*, at page 194, we said:

"It may be conceded that a description in a conveyance which bounds the land conveyed by a stream, if unnavigable, will be construed as meaning the thread of the stream, but where the description is specific in its language, naming the bank of the stream as the boundary of the land conveyed, we think the decided weight of authority is to the effect that the grantee's rights will not extend beyond such specified boundary so as to give him any right in the bed of the stream. [Citing authorities.] We understand it to be conceded in the briefs of counsel that Cedar river is unnavigable and that Black river is navigable. As to the latter, it is plain that the title to the bed thereof is not in appellant, but is in the state. Section 1, article 17, state constitution."

From these, and numerous other authorities which might be cited, it is plain that the state is the owner of the bed of the Duwamish river, being a navigable river, and that the appellants Loeb and Moyses have no interest therein. And the fact, if it is a fact, that their land borders upon the shore

of the river does not give them any rights, either in the bed of the stream or in the waters thereof.

The jury returned a finding to the effect that the property of the appellants Loeb and Moyses would receive maximum benefits in the sum of \$3,100. The maximum benefits for the whole improvement was the sum of more than \$2,000,000; and the cost of the improvement was estimated to be \$1,650,000. It was conceded that King county had authorized a bond issue of \$600,000 to be applied to the cost of the improvement. It is argued by the appellants that, because of the revenues which can and will be obtained by the sale of dirt taken from the excavation of the waterway, and because of the sale of the bed of the stream, that the cost of the improvement will be reduced to about \$850,000; that the assessment of maximum benefits against the land of the appellants will thereby be reduced to about \$1,500; and that the excess between this and \$3,100, as found by the jury to be the maximum benefits to this property will be assessed against the property of the appellants and will stand as a lien against it in double the amount actually necessary to make the improvement; that this, in substance is a taking of their property to that extent without due process of law.

The waterway statute, at § 14, provides that the jury shall find the maximum amount of benefits. From a reading of the whole act, it is apparent that this maximum amount of benefits is to be the basis upon which the assessments for the amounts actually needed will finally be made by the district commissioners. While it is true that this assessment is in the nature of a lien against the property to pay for the improvement, it is, in reality, only a determination of the benefits which the property will receive by the improvement, and limits the extent to which an assessment may be made. As stated in *Commercial Waterway District No. 2 v. Seattle Factory Sites Company*, *supra*, a trial upon the issue of maximum benefits is not a constitutional trial by jury. "The legislature would have satisfied all constitutional requirements in

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that regard had it provided for the determining of maximum benefits, upon due notice and hearing, by some board or tribunal, entirely without the aid of a jury, as it has in ordinary local assessment proceedings."

The fixing of the amount of the maximum benefits does not, in our opinion, violate any rule of law, nor does it fix upon the appellants' property any amount which becomes a lien. That is done when the assessment is made by the commissioners, and then only to the extent of the cost. We are of the opinion, therefore, that there is no merit in this contention. In fact, the less the improvement may cost, the less the appellants will be required to pay; the benefits to their property will remain the same. No authorities are cited to this proposition by the appellants and it seems to us that the position of the appellants is not tenable.

The appellants argue that the court erred in hearing the evidence of certain expert witnesses, for the reason that it is shown that these witnesses were disqualified to testify as to benefits and values. As we read the record, these witnesses, upon direct examination, testified that they were acquainted with the lands in question and with the values thereof, and with the benefits that would accrue to the lands by reason of the improvement. It is plain, we think, that this made their evidence proper to be considered by the jury. If, upon cross-examination, the witnesses disclosed a lack of knowledge as to values, the facts disclosed by such cross-examination were proper to be submitted to the jury for their consideration in passing upon the weight of such evidence. But the competency of the witnesses on direct examination was clearly shown. *North Coast R. Co. v. Gentry*, 58 Wash. 82, 107 Pac. 1060.

In his instructions to the jury, the court said:

"In this case you have been permitted to view the premises in question. One of the objects of the view was that you might acquire such information as to the physical conditions and characteristics there as would come to one through the

sense of seeing. What the jury sees they know; and another purpose of the view was that by putting you in possession of such information as would come to you through the sense of seeing you would be better thereby enabled to weigh, consider, and apply the testimony which would be introduced in the trial of the cause. In this case it is your duty to harmonize the testimony of the witnesses, if possible, so as not to impute false swearing to any witness. If this can be done consistently with the truth you should do so, but if you find it impossible to harmonize the testimony, and if you find further from the evidence of your senses of view and from the testimony on the stand, that any witness who has testified before you has wilfully testified falsely concerning any material fact in the case, then you have a right to disregard his entire testimony except in so far as you may find that the testimony of such witness is corroborated by other credible evidence or by facts and circumstances proved on the trial. And if in your judgment the evidence is conflicting as to the benefits you should resort to the knowledge gained upon your view as bearing upon the weight to be given to the various and conflicting statements and estimates."

It is contended by the appellants that the words, "What the jury sees they know," and the last sentence of this instruction, were erroneous. We think this instruction is substantially the same as one which was approved by us in *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864. See, also, *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*, 66 Wash. 663, 120 Pac. 525.

A large number of other instructions are complained of as erroneous, but as the appellants rely upon the points which we have hereinbefore discussed and as we find no merit in the objections to the instructions, we shall not notice them further.

We pass now to the appeal of the Puget Mill Company. It appears that the Puget Mill Company owns about 900 acres of land which is included within the improvement district. The jury found that the maximum benefits to this tract of land would be \$69,450. It is argued by the appellant that the improvement will not benefit this tract of land to any ap-

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preciable extent and that, therefore, the finding of the jury was erroneous. It is sufficient to say that this question was tried to the jury. There was evidence to the effect that the land would be benefited in the amount claimed. There was also evidence and strong argument to the effect that it would not be benefited anything like the amount claimed. But this was a question which was properly submitted to the jury, and this court cannot say from the record that the amount of maximum benefits found exceeds the benefits which may accrue to the property. The other points presented by this appellant are decided in what we have already said heretofore.

The appellants Puget Sound Traction, Light & Power Company, the Seattle Electric Company, Boston Safe Deposit & Trust Company, and Old Colony Trust Company are interested in a tract of land bordering upon the river. This tract comprises seventeen and one-half acres used as one entire tract by the traction company lying on the right bank of the river, at a point which has been designated in the testimony as the "Big Bend." In 1906, the Seattle Electric Company began the construction upon this property of a steam electrical plant, which cost \$945,000 to build, exclusive of the value of the land. This building was constructed for the purpose of generating a supply of electrical energy for the operation of its street cars in the city of Seattle. The plant consists of a heavy concrete building, practically indestructible, 75 feet wide, 220 feet long, and 70 to 80 feet high. As a part of the plant, there are two smokestacks, one of steel 110 feet high, and one of concrete over 265 feet high and 17 feet in diameter. The building is fitted with machinery capable of generating 17,000 kilowatts of electricity, or 22,000 horse power, at a pressure of 13,200 volts. These engines are operated by steam which, after passing through the engines, is condensed in a vacuum by a heavy flow of cold water. These engines cannot be operated in a manner to obtain their greatest efficiency without a continuous flow of cold water. The plant was put in operation in the spring of 1907, and was

continuously used thereafter until the spring of 1912, as one of the principal sources of supply of electric current by the Seattle Electric Company for the operation of street cars in the city of Seattle. Since that time, it has been and now is maintained as an auxiliary and emergency plant in the event of the breakdown or damage of any of its water power plants.

The plan of improvement proposed by the waterway commission is to excavate a canal in substantially a straight line from the upper to the lower end of the bend of the river upon which this property is located, and to construct a dam across the bed of the present channel at the upper end of the bend, so as to divert the flow of the river from its present natural channel into such canal or new channel, thereby diverting the whole of the flow of the river from in front of the plant of the traction company.

The trial court refused to permit these appellants to show that, after the water had been diverted from its present into its new channel, it would be necessary for them to construct a pipe line for a distance of five miles in order to procure fresh water for the purpose of operating its machinery, and would have to construct pumping stations and procure a right of way for such pipe line and stations; and that the cost to these appellants of procuring water for this purpose would exceed \$444,000. It is alleged that this was error, and that the diversion of the Duwamish river from its natural channel into the artificial channel would cause great damage to these appellants. It is argued first, that the waters of the river were being used by the traction company for a public use, and that such waters could not be condemned for another public use; second, that the title to the traction company's property on which its plant is located extends into the bed of the Duwamish river and below the ordinary high tide; third, that since its title extends into the bed of the river, such flow cannot be diverted without the paying of just compensation on account of damages caused thereby; fourth, that the levy of an assessment upon the property within the district in

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excess of the sum required to pay the cost of the improvement constituted a taking of property without due process of law; and fifth, that the action of the trial court in permitting counsel for the commissioners to attach to the forms of verdict submitted to the jury statements of what their witnesses testified the maximum benefits would be constituted reversible error. We shall notice these contentions in their order as stated.

It is first contended that, because the appellants' property was already devoted to a public use, that it cannot be condemned. The appellants cite cases to the effect that it is the established rule that property devoted to a public use may not be taken for another public use without legislative grant, either in express terms or by necessary implication. There can be no doubt about this being the rule. Section 7 of the Laws of 1911, p. 19, defining the powers of the waterway district provides, at subdivision "a," that the district shall have the right of eminent domain "with power by and through its board of commissioners to cause to be condemned and appropriated private property for the use of said organization in the construction and maintenance of a system of commercial waterways and make just compensation therefor: Provided, That the property of private corporations may be subjected to the same rights of eminent domain as that of private individuals: Provided further, That the said board of commissioners shall have the power to acquire by purchase all the property necessary to make the improvements herein provided for." 3 Rem. & Bal. Code, § 8172a.

Subdivision "d" of that section provides:

"In the accomplishment of the foregoing objects, the commissioners of such waterway district are hereby given the right, power and authority by purchase or the exercise of the power and authority of eminent domain, or otherwise, to acquire all necessary and needed rights of way in the straightening, deepening, or widening, or otherwise improving of such rivers, watercourses or streams." *Id.*, § 8172a.

It seems to us that the power is there directly conferred, and at least by necessary implication, upon the district to acquire, either by purchase or condemnation, as the commission may see fit, *all necessary* and needed rights of way. We are of the opinion, therefore, that, in case of necessity, the waterway commission has at least implied authority under these provisions to take the property of the appellants. *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

These appellants argue that the title of the traction company to the property upon which its plant is located extends into the bed of the Duwamish river, and below the line of ordinary high water. On the trial of the case, there was introduced in evidence several plats of the lands. It appears that the tract of 17½ acres had been platted into lots and blocks known as Queen Addition and Queen Addition Supplemental. It is conceded that the appellants purchased the lots upon which their plant is located according to the recorded plats thereof. These plats, in the description of the additions, state that the boundaries begin at a certain point and run at a certain angle for a given distance "to the right bank of the Duwamish river, thence up stream with the meanders of said right bank." And in the supplemental plat, it is stated that the boundaries begin at a certain point and extend a certain distance in a given direction "to the meanders of Duwamish river." It is apparent from a reading of the descriptions upon these plats that the description of Queen Addition extended only to the right bank of the Duwamish river, and that the description of Queen Addition Supplemental extended to the meanders of the Duwamish river and along the meanders thereof. We are unable to determine from the record whether these meanders were in the bed of the river or upon the bank, but that fact is not important. The trial court was of the opinion that the title acquired by the appellants extended only to the bank of the river. We are inclined to the opinion that the trial court was right in this respect. If the property of the appellants

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extended only to the bank of the river, and did not include the bed of the river, it is plain from what we have heretofore said that the appellants had no rights beyond the line of the property and no rights in the waters of the river. If these meanders are in the bed of the river, the appellants have no rights therein, because it is conceded that the river is a navigable stream. In *United States v. Chandler-Dunbar Water Power Co.*, decided May 26, 1913, Advance Sheets U. S. Supreme Court, July 1, 1913, page 667, the supreme court was considering the right of the upland owners to the flow of the waters of a navigable stream, and it was there said:

"But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows, or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."

And in *Scranton v. Wheeler*, 179 U. S. 141, at page 163, the court said:

"The primary use of the waters and the lands under them is for the purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation . . . If the riparian owner cannot enjoy access to navigability because of the improvement or navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of ac-

cess ceases alone for that reason to be of value, there is not, within the meaning of the constitution, a *taking* of *private* property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case, "in due subjection to the rights of the public." "

And in *McKeen v. Delaware Division Canal Co.*, 49 Pa. St. 424, it was said:

"Every one who buys property upon a navigable stream purchases subject to the superior rights of the Commonwealth to regulate and improve it for the benefit of all her citizens."

In *Zimmerman v. Union Canal Co.*, 1 Watts & S. (Pa.) 346, it was said:

"It seems, however, to be but in accordance with the decisions made upon the subject, that it is one of the incidents to holding property on one or both sides of a navigable stream that the party is subject to, any inconvenience that may arise from deepening the channel, or otherwise improving the navigation of such stream, is to be submitted to, without any right to damages therefor, except as such improvement may flood or drown their lands."

See, also, *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Wilson v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 102, 127 Pac. 847.

We are of the opinion, therefore, that the court properly excluded evidence tending to show the cost or the necessity for obtaining water at some other place and obtaining rights of way therefor, because the appellants have no interest in the waters of the navigable river which they can enforce against the state or its agency.

It is next argued that the levy of assessments for maximum benefits is void for the reason that it is grossly in excess of the estimated cost of the improvement. It is unnecessary to consider this question further. It is the same as hereinbefore determined.

It is next argued that the finding of the jury of the maximum benefits is void because the court permitted statements of the benefits claimed by the respondents to be submitted to

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the jury. We have seen above, in so far as the finding of the jury of maximum benefits was concerned, that the jury was not a constitutional jury for that purpose. There were some 10,000 different pieces of land included within the assessment district. It was, of course, impossible for the jury to remember what the witnesses had testified with reference to the special benefits to each of these tracts. The court therefore permitted the estimates of the witnesses to be taken by the jury to the jury room. The jury was instructed that these memoranda were not in any sense to be considered as evidence, but were given to them as aids to their recollection of the testimony in case they needed to refresh their recollection. We think these estimates were of no greater moment than the allegations of the commissioners as to what the maximum benefits would be, which was held in *Commissioners Commercial Waterway District No. 2 etc. v. Seattle Factory Sites Co.*, *supra*, not to be prejudicial. In *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 813, the supreme court of California held that it was not error to permit the jury to take with them and use in their deliberations any exhibit where the circumstances call for it, with a cautionary instruction as to the nature and use which they shall make of the exhibit. We think there was no prejudicial error in this.

It is next argued that the finding of the jury of the maximum benefits is void for the reason that the appellants were not granted a separate trial upon that question. It is sufficient answer to this to say that the statute does not require a separate trial upon these questions. It in substance requires that the benefits shall be determined by the jury in one proceeding; and it would therefore be improper to award a separate hearing upon each assessment of maximum benefits. There is no merit in this assignment.

On the appeal of Columbia & Puget Sound Railroad Company, in addition to the constitutional questions and questions hereinbefore discussed, it is contended that the maximum benefits assessed against the right of way of the railroad com-

pany is excessive. It appears that the right of way of this appellant was located between the rights of way of two other railway companies running through this improvement district. And it is argued that, by reason of the fact that this appellant, in order to obtain any business, will have to cross over the right of way of at least one of the other railway companies, it therefore cannot be benefited by the improvement. It is also contended that this right of way is used exclusively for railway purposes, and is not benefited by the improvement. It is sufficient answer to this contention to say that the maximum benefits assessed by the jury has evidence in the record to support it; and the fact that the right of way is at present being used for railway purposes only is no objection to its assessment for benefits. In *Great Northern R. Co. v. Seattle*, 73 Wash. 576, 132 Pac. 234, we said:

"In the case cited [*Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, 123 Am. St. 955, 12 L. R. A. (N. S.) 121] we further held that property abutting upon a local improvement, and devoted to railroad purposes, might be assessed for benefits conferred, and that such use would not relieve it from liability to assessment, the controlling question being, not whether the present use would be benefited, but whether the property itself, irrespective of such use, would be benefited."

This is decisive of the question presented upon behalf of this appellant.

On the part of the appellants Rines, et al., in addition to the questions already hereinbefore decided, it is argued that the assessments upon unplatted property was greater than that upon platted property by reason of the fact that no deductions were made for streets. The act under which this proceeding is maintained provides, at Id., § 8177-2, that the jury "shall further find a maximum amount of benefits per acre or per lot or tract to be derived by each of the land owners." Of course this means that the jury shall determine the maximum benefits upon the property as it appears at the time, and it is not for the jury to consider whether acreage or

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tracts will thereafter be platted. It is their duty to determine the maximum benefits that would accrue from the improvement to the property as it was at that time, irrespective of whether it might or might not be platted in the future. This is all the jury did in this case. We think there is no merit in the point raised.

Upon the appeal of the Estate of Harriett Macauley, deceased, it is argued that the verdict awarding this appellant damages for property taken was contrary to the evidence. It is conceded by the appellant that the evidence is conflicting upon the amount of damages sustained. In such cases, we have held that we will not disturb the verdict of the jury upon questions properly submitted. *Bartlett v. Plaskett*, 78 Wash. 449, 181 Pac. 1125.

The other questions presented by these appellants are hereinbefore decided. We find no error in the record.

The judgments appealed from are therefore affirmed. The costs recoverable by the respondents will be taxed against the six appellants equally.

CROW, C. J., PARKER, and MORRIS, JJ., concur.

[No. 9964. *En Banc*. December 31, 1913.]

C. E. MALETTE, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—WAGES—MINIMUM WAGE—AUTHORITY TO FIX. The legislative body of a city of the first class has the power to prescribe a higher rate of wages than the prevailing rate, as a minimum of wages to be paid for common labor on public work to be paid for by special assessments against property specially benefited, in view of Const., art. 11, §§ 10, 11, conferring the largest measure of local self government compatible with the general authority of the state, and Rem. & Bal. Code, §§ 7518 and 7507, conferring general authority to exercise all usual powers, whether specified or not, and to make all regulations necessary for the preservation of health and good order in its limits.

¹Reported in 137 Pac. 496.

SAME—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—CONTROL—MINIMUM WAGE. Street improvement work, to be paid for by special assessments, is public work, regardless of the mode of payment, and therefore within the control of the public authorities as to the minimum wages to be paid for common labor thereon.

SAME—IMPROVEMENTS—MINIMUM WAGE—ORDINANCE—VALIDITY—PUBLIC POLICY. An ordinance prescribing a higher rate of wages than the prevailing rate, as a minimum of wages to be paid for common labor on public work to be paid for by special assessments against property specially benefited, is not contrary to any public policy of the state, even if it increases the cost of the work.

SAME—IMPROVEMENTS—ASSESSMENTS—PUBLIC OR PRIVATE WORK—AGENCY OF CITY—MINIMUM WAGE. In the improvement of streets, at the expense of the property specially benefited, a city does not act in its proprietary capacity or as an agent of the owner whose property is assessed to pay for the work, so as to make the work private work and not subject to the minimum wage law provided for public work; but rather in its governmental capacity to open and improve streets, and as the agent of the law in letting the contract and collecting the assessment.

SAME—PUBLIC IMPROVEMENTS—CONTRACTS—METHOD—PUBLIC BIDS. Under Rem. & Bal. Code, §§ 7507, 7560, and 7567, providing that cities of the first class may provide for making local improvements to be paid for by special assessments, to determine what work shall be done in whole or in part at the expense of the property benefited, and to provide for the manner of making and collecting the assessments, the city is not required to let the contracts upon competitive bids, in the absence of any statute or charter requirement so directing.

SAME—PUBLIC IMPROVEMENTS—ORDINANCES—MINIMUM WAGE—REASONABLENESS. There is a presumption of the reasonableness of an ordinance prescribing a higher rate of wages than the prevailing rate, as a minimum of wages to be paid for common labor on public work to be paid for by special assessments against property specially benefited; and taking notice of existing conditions and circumstances and the increased cost of living during the past few years, the courts cannot say that an ordinance is unreasonable in fixing a minimum wage of \$2.75 per day for common laborers on street improvement work, payable from special assessments upon property benefited.

GOSE, CHADWICK, and MOUNT, JJ., dissent.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered July 1, 1911, overruling objections of a property owner to an assessment for a local improvement, upon appeal from the city council. Affirmed.

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Voorhees & Canfield, for appellant.

H. M. Stephens, A. M. Craven, Wm. E. Richardson, and E. E. Sargeant, for respondent.

Alex M. Winston, *amicus curiae*.

ON REHEARING.

ELLIS, J.—The facts out of which this controversy arose are stated in the opinion on the first hearing (*Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005); but, in order to present a single, comprehensive review of the case, we deem it not amiss to restate them.

The legislature, in 1899, passed an act declaring that "hereafter eight hours in any calendar day shall constitute a day's work on any work done for the state or any county or municipality within the state" (Rem. & Bal. Code, § 6572; [P. C. 291 § 115]); and provided that,

"All work done by contract or subcontract on any building or improvements or works on roads, bridges, streets, alleys or buildings for the state, or any county or municipality within the state, shall be done under the provisions of this act: Provided, that in cases of extraordinary emergency, such as danger to life or property, the hours for work may be extended, but in such case the rate of pay for time employed in excess of eight hours of each calendar day, shall be one and one-half times the rate of pay allowed for the same amount of time during eight hours' service. And for this purpose, this act is made a part of all contracts, subcontracts or agreements for work done for the state or any county or municipality within the state." Rem. & Bal. Code, § 6573 (P. C. 291 § 116).

The act further declared any one violating its provisions guilty of a misdemeanor and, upon conviction, subject to a prescribed punishment. Rem. & Bal. Code, § 6574. In 1903, another act was passed, declaring that:

"It is a part of the public policy of the state of Washington that all work 'by contract or day labor done' for it, or any political subdivision created by its laws, shall be per-

formed in work days of not more than eight hours each, except in cases of extraordinary emergency" (Rem. & Bal. Code, § 6575 [P. C. 291 § 117]);

and that all contracts for such work should provide that they might be cancelled by the officers of the state, county, or city having supervision of the work, in case of a violation of the statute (Rem. & Bal. Code, § 6576; P. C. 291 § 119); and making it the duty of such officers to incorporate in all such contracts stipulations "as provided for in this act," and "to declare any contract canceled the execution of which is not in accordance with the public policy of this state as herein declared." Rem. & Bal. Code, § 6577 (P. C. 291 § 121).

In pursuance of the public policy of the state so declared, the city of Spokane, on August 24, 1909, by ordinance No. A4422, so far as here material, provided that:

"Section 1. Hereafter eight (8) hours in any calendar day shall constitute a day's work on any work done for the city of Spokane, subject to the conditions hereinafter provided.

"Section 2. Hereafter all laborers employed by the day on municipal work, either directly by the city or by contractors, subcontractors, individuals, partnerships, associations or corporations, on all work for the city, shall receive and be paid not less than \$2.75 for a calendar day's work of eight (8) hours. The provisions of this section shall apply to, and govern all work done for the city of Spokane and all work for any individual, firm, partnership, association or corporation which is done under the direction or under the supervision of, or which is to be accepted by the city of Spokane or any officer or agent thereof."

The ordinance further provided that, in cases of emergency, the hours for work might be extended, but that the rate of pay for excess time should be one and one-half times the rate allowed for the same amount of time during the eight hours service, and that the ordinance be made a part of all contracts thereafter made. By express stipulation and reference thereto, this ordinance was made a part of the contract

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for the public work the assessment for which is contested in this action.

On March 10, 1910, the city passed another ordinance, No. A5016, providing:

"That hereafter all work done by common laborers for the city of Spokane or for any contractor, sub-contractor or other person doing work by contract or otherwise for the city of Spokane, shall receive the sum of three dollars (\$3), per day for eight hours labor ;"

and that the ordinance should be in force from and after April 1, 1910.

On March 25, 1910, the city council, by ordinance, provided for the improvement of Sixteenth avenue by constructing therein a sewer, to be paid for by special assessments against the property benefited, and created an assessment district. The contract for the work was thereafter let to one Broad, and when he had completed the work thereunder, an assessment roll was prepared and notice of the time and place for hearing objections was given. The appellant, an owner of property in the district, appeared and objected to the confirmation of the roll. His objections were overruled, and he appealed to the superior court. From an adverse decision of that court, he prosecutes this appeal.

The evidence showed that the contractor, in the performance of his contract, paid \$2.75 a day for each common laborer employed in the work, as required by the ordinance first above mentioned and by his contract. The court refused to hear testimony as to whether he paid \$3 a day, as required by the second ordinance above mentioned. The evidence showed that the prevailing wage for common laborers in the city of Spokane and vicinity, at the time of the performance of the contract in August, 1910, was \$2.25 a day, whether for a ten-hour, nine-hour or an eight-hour day; and that, in March, when the improvement ordinance was passed, the prevailing wage was \$1.85 for a ten, nine, or eight-hour day. There was no evidence whatever as to any distinction in pay by

reason of shorter hours, nor any evidence whatever that compensation for employment was ever computed by the hour. The contractor testified that 59 per cent of the cost of the work was paid out for common labor, and that, but for the ordinance, his bid would have been materially less.

The position taken by the appellant, as stated in the original opinion, and as adhered to in the briefs and argument on rehearing, is admirably summarized as follows:

"That the legislature may fix the hours of labor upon all public works and for public work even in cities is now well settled, and no allusion to sustaining authority will be made. Indeed, that feature of the case is not challenged by appellant; but it is contended that, where the city is acting merely as an agent of the property owner, it is bound to do its work to his best advantage, and cannot empirically fix a wage and compel its payment by an independent contractor. Appellant bases his argument on two propositions; (1) that the ordinance is unreasonable, contrary to public policy, and oppressive; (2) that the assessment is in contravention of the constitution of this state and of the constitution of the United States, in that it takes the property of this appellant without compensation and without due process of law. Abandoning legal phraseology, the concrete question, put in plain English is whether a city can improve the property of a citizen, either upon his petition or against his will, and tax an arbitrary sum therefor that puts the cost unreasonably above the cost of like work if done through the instrumentality of a private agency." *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005.

The last sentence quoted seems to beg, rather than state, the real question. Of course, if the minimum wage is assumed to be unreasonably high, it would be indefensible on any theory, whether fixed by general statute or by ordinance, and whether paid out of a fund raised by general taxation or by special assessment. The real questions are: (1) Is it within the power of any legislative body, whether of the state or city, to fix a minimum wage for common labor as applied to public work paid for by special assessment? In other words, is such legislation void as in contravention of the

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state and Federal constitutions in that it takes property without compensation and without due process of law? (2) Is the ordinance in question contrary to any public policy of the state, either expressed in, or implied from, state legislation? (3) Is the ordinance an unreasonable exercise of the right to prescribe the terms of contract by one of the parties, or is the amount prescribed an unreasonable wage? We will endeavor to discuss these questions, so far as may be, separately.

I. Is it within the legislative power, either of state or city, to prescribe a higher rate of wages than the prevailing rate as a minimum of wages to be paid for common labor in the doing of a public work to be paid for by special assessments against the property specially benefited thereby? The principal argument directed against such laws, when enacted by the state itself, is the claim that they necessarily increase the cost of the work. If, therefore, laws having exactly the same tendency have been upheld, such decisions furnish direct authority for upholding a frank and undisguised minimum wage law. As stated in the original opinion, it is now too well settled to require citation of authority that the legislature may fix the hours of labor upon all public work and for public work, even in cities. It is also true, as there stated, that "laws fixing the hours of labor and providing that no less than the *going* rate of wages shall be paid under contracts such as we have before us, have been generally upheld." To put the matter more exactly, we add that laws fixing the hours of labor have been generally upheld by the courts, even when coupled with the provision that the laborer shall receive for the shorter day prescribed a minimum of wages "not less than the current rate of per diem wages in the locality where the work is performed." Obviously this is a provision for pay *above* the "*going* rate of wages" for the same amount of time. *In re Dalton*, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380; *State v. Atkin*, 64 Kan. 174, 67 Pac. 519, 97 Am. St. 343; *Atkin v. Kansas*, 191 U. S. 207; *Byars v. State*, 2 Okl. Cr. 481, 102 Pac. 804. As

said in *Atkin v. Kansas*, *supra*, quoting from *In re Ashby*, 60 Kan. 101, 55 Pac. 336:

"When the eight-hour law was passed the legislature had under consideration the general subject of the length of a day's labor for those engaged on public works at manual labor, without special reference to the purpose or occasion of their employment. The leading idea clearly was to limit the hours of toil of laborers, workmen, mechanics, and other persons in like employments, to eight hours, without reduction of compensation for the day's services."

The case so quoted by the United States supreme court, *In re Ashby*, is in itself a clear demonstration that the maximum hours law there under consideration had the necessary effect of fixing a minimum daily wage above the current rate for the same class of work. Moreover, it seems to have been overlooked in the former opinion in this case that the eight-hour law of this state, so far as overtime is concerned, expressly provides a minimum wage which would necessarily be above the going rate for the same amount of time. In Rem. & Bal. Code, § 6573 (P. C. 291 § 116), above quoted, it is provided that, in cases of emergency, the hours of work may be extended, "but in such case the rate of pay for time employed in excess of eight hours of each calendar day shall be one and one-half times the rate of pay allowed for the same amount of time during eight hours' service." A similar provision is found in the eight-hour law of Kansas, and it was for the violation of that provision, as well as the eight-hour provision, that the defendant in *Atkin v. Kansas* was convicted. See stipulated facts, 191 U. S. p. 210. The same provision is also found in an eight-hour law contained in a legislative charter of the city of Buffalo, and was upheld as constitutional and valid, and a contractor was held criminally liable for its violation. *People v. Warren*, 77 Hun 120, 28 N. Y. Supp. 303; *People ex rel. Warren v. Beck*, 10 Misc. Rep. 77, 30 N. Y. Supp. 473.

Assuming, as seems to be assumed, both in argument and in the original opinion in the case before us, that any mini-

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imum of wages fixed above the current rate necessarily increases the cost of the work (a thing by no means certain), then it cannot be denied that a provision such as above quoted from the Kansas law would have precisely the same effect. If the one would increase the cost of the work, so, also, would the other, as a simple example will demonstrate. Assuming the current rate of per diem wages to be \$2 for a ten-hour day, and assuming, also, a uniform efficiency in the work of a given laborer, then it follows that the minimum wage of \$2 a day for, let us say, an eight-hour day, is just exactly forty cents more for the same work than it would cost but for the minimum wage provision. As another illustration, the evidence in the case before us shows that the observance of our own state eight-hour law alone would have had precisely the same effect on the contract here in question. The contractor himself testified in effect that, but for the minimum wage ordinance, the labor on this work would have cost him \$2.25 a day for an eight-hour day, while the number of hours constituting a day's work customary at the time and place was ten hours. It is too plain for argument that every maximum-hours law prescribing less than the number of hours usually constituting a day's labor, when coupled with a provision for minimum pay not less than the current rate for a day's labor, is a minimum wage law, pure and simple, prescribing a wage above the current rate for the same class of labor. Every objection, therefore, which can be logically or legally raised against an undisguised minimum wage law can be advanced, just as logically and just as legally, against the usual eight-hour law. The appellant seems to recognize this fact, since he argues that there are only two grounds upon which courts have held valid laws limiting the hours of labor; that one applies to work hazardous to the health of the employees, as working in mines, mills and the like which, of course, rests upon the police power of the state (*Holden v. Hardy*, 169 U. S. 366), or where the employee is a child or woman, which also rests upon the same power

(*State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 92 Am. St. 930, 59 L. R. A. 342; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324); and that the other exception is based upon the principle that, when the state or any of its municipalities performs public work, it then, as an employer, has the right to fix the terms upon which it will permit labor to be done for it. As examples of the last mentioned class of decisions, appellant cites *Atkin v. Kansas*, *supra*; *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61, and our own decisions, *In re Broad*, 36 Wash. 449, 78 Pac. 1004, 70 L. R. A. 1011, and *Gies v. Broad*, 41 Wash. 448, 83 Pac. 1025. It is true that the cases cited, and also the Oklahoma case, *Byars v. State*, *supra*, were based upon the latter ground, which is clearly and logically expressed in *Atkin v. Kansas*, *supra*, by the late Justice Harlan, speaking for the Federal supreme court, as follows:

"The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly, or by one of its instrumentalities, the work was of a public, not private, character.

"If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for, or on behalf of, a municipal corporation of the state, does not infringe the personal liberty of any one. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employes, mechanics and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to

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discharge the duties appertaining to citizenship. We have no occasion here to consider those questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work *for it or for one of its municipal agencies*, should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

While, as shown by this quotation, the supreme court did not deem it necessary to place the decision on any other ground than the power of the state to prescribe the terms upon which contracts with it or its agent, the municipality, might be made, it is significant that it also suggests another ground; namely, the promotion of the "general welfare of employees, mechanics and workmen upon whom rests a portion of the burdens of government," and as tending to the production of better citizenship, thus unmistakably intimating that the act might also be soundly sustained as an exercise of the police power.

The appellant argues, and seems to have impressed the members of Department One of this court, save the late Chief Justice Dunbar, with the view that, though this court and other courts have held the eight-hour law sufficiently valid and constitutional to sustain a criminal prosecution, and though an exactly parallel ordinance to the one here in question was held by this court sufficiently valid to sustain an ac-

tion by a laborer for the collection of a part of the minimum wage above the current rate for overtime, which was withheld by the contractor (*Gies v. Broad*, 41 Wash. 448, 83 Pac. 1025), still those cases do not sustain, as constitutional, either the eight-hour law or the minimum-wage ordinance as applied to contracts for public work to be paid for by special assessment, or the minimum-wage ordinance as to any work; since, in the original opinion, it is said: "So far as we have been able to find, laws fixing a minimum of wages for unskilled labor have been uniformly condemned." The case of *Clark v. State*, 142 N. Y. 101, 36 N. E. 817, was not cited on the first hearing, and was hence excusably overlooked. In that case, a statute of the state of New York fixing minimum wages for day laborers on public works of the state was upheld by the court of last resort of that state, using the following language:

"It must be assumed that the legislature, and all other public bodies intrusted with the functions of government, general or local, will use the power conferred by the constitution or the law fairly, and in the public interests. There is no express or implied restriction to be found in the constitution upon the power of the legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state. That legislation is doubtless open to criticism from the standpoint of sound policy and expediency, but the courts have nothing to do with these questions, so long as it is not in conflict with the constitution; and we think that a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, was within the power of the legislature to enact, whatever may be said as to its wisdom or policy."

We are persuaded that the view expressed in the original opinion that, in *Gies v. Broad*, *supra*, this court did not, in fact, hold the minimum wage ordinance of Spokane there involved constitutional, and the statement that "the sum of the court's holding" in that case was "that the contractor could not take a wage from a property owner and convert it, or any

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part of it, to his own use," must be modified. As a matter of fact, that was one result of the holding in that case, but was far from its sum. As shown by the opinion itself, the court could not have held that, nor anything else touching the merits of the case, until it first decided that the ordinance was constitutional and valid. The amount involved was only \$15.91, and the only thing which gave the court jurisdiction of the appeal for any purpose was the question of the constitutionality of the ordinance. As pointed out by the court:

"The appeal is brought within the jurisdiction of this court by reason of the fact that the action involves the validity of the ordinance above mentioned; the appellant contending that that part of the ordinance which fixes the minimum sum to be paid as wages for a day's labor on any public improvement undertaken by the city of Spokane, is unconstitutional and void." *Gies v. Broad*, 41 Wash. 448, 88 Pac. 1025.

The court then held that, under the rule announced in *Henry v. Thurston County*, 31 Wash. 638, 72 Pac. 488, no other question save that of the validity of the ordinance could be reviewed, adding, "If we find the ordinance valid, the inquiry is ended; if invalid, the judgment falls because founded on the ordinance." The following language used by Department One touching the opinion in *Gies v. Broad*, seems, therefore, hardly justified:

"In this opinion there is an expression which, although not necessary to the decision, may, if taken without qualification, seem to support the contention of the respondent. It follows:

"The principle involved in that case [*Atkin v. Kansas*, 191 U. S. 207] is not distinguishable from the principle involved in the case now before us. For, surely, if it be within the power of the state to limit the number of hours a laborer may be permitted to labor in one calendar day on any public work undertaken by it, it can fix the minimum sum that shall be paid him as wages for such labor. The power to do either must rest on the principle that 'it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.'"

The language was not only "necessary to the decision," but must be "taken without qualification," since it decided the only question in the case of which this court had jurisdiction. The matter of estoppel as against the contractor to dispute a \$15 debt could not give this court jurisdiction, in the absence of the constitutional question. Since no member of this court has yet expressed a readiness to frankly overrule the decision in *Gies v. Broad*, the conclusion seems irresistible that the ordinance here in question must be held valid.

But it is argued that *Gies v. Broad* and *Atkin v. Kansas*, and, by parity of reason, *State v. Atkin*, 64 Kan. 174, 67 Pac. 519, 97 Am. St. 343 (which was affirmed by the last mentioned case), and *Byars v. State*, 2 Okl. Cr. 481, 102 Pac. 804, do not determine the constitutional question because they did not arise at the instance of a taxpayer or of a protesting property owner. To the writer of this opinion, however, it seems hardly probable that the supreme courts of three states and the supreme court of the United States would have overlooked a phase of the question which, if counsel's contention be correct, must have made the decision of each of those courts different; since no court will be presumed to hold a man liable criminally, or even financially, for violating a void law. As pointed out in *In re Broad*, 36 Wash. 449, 78 Pac. 1004, 70 L. R. A. 1011, the unconscionable conduct of the contractor would not be a pertinent argument in such a case. As a matter of fact, the very contention now made appears to have been made in *State v. Atkin*, *supra*, which arose out of a contract for work paid for by special assessments. At any rate, the point was considered. The supreme court of Kansas said (see opinion 64 Kan. p. 175):

"The law which appellant violated must have its application in the light of the fact that municipal corporations are the creatures of the state. The legislature gives them being. They let contracts for the improvement of streets under

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express authorization of the legislature, and cannot do so in the absence of such authority. In this instance the lawmaking power provided that the cost of the paving which the appellant was constructing should be paid by assessment against the abutting property. It might have provided a different method of payment, or withheld entirely from the city the right to improve its streets."

And again (see opinion 64 Kan. p. 179):

"The fact that the abutting property-owners are charged more for the improvement by the application of the restrictive provisions of the law reducing the hours of labor may be admitted; yet if the work had been done by the state itself, which, as we have shown, has supreme authority in such matters, the property-owners could not complain that it employed and paid its servants conformably to the statute in question.

"There can be no distinguishing difference between the acts of the contractor in the employ of the county passed upon in the case of *In re Dalton*, *supra*, and those of the appellant here. Both were proceeding under contracts made with them by the agents of the state, and the principal had power to direct that eight hours should constitute a day's work for all persons laboring in its behalf."

With these facts and this holding before it, the supreme court of the United States affirmed the judgment of the supreme court of Kansas without reservation, on the ground that the work was of a public character, saying of the act, "indeed, its constitutionality is beyond all question." This, notwithstanding the fact that the contractor's conduct, as shown by the agreed facts (191 U. S. p. 210), was attempted to be excused by the fact that his contract with the laborer was for pay by the hour at the current hour rate, apparently in order to evade the minimum wage provision of the Kansas eight-hour law to which we have referred. Moreover, the brief for the plaintiff in error printed in the report of the case shows that the fact that the work was paid for by special assessments was called to the attention of the United States supreme court. It seems plain, therefore, when the actual

facts involved and the opinion of the Kansas court, affirmed by the supreme court of the United States, are considered, that it does sustain the decision in *Gies v. Broad, supra*, and that, when Department One of this court, in the first opinion in this case, reaffirmed allegiance to the doctrine laid down in *Atkin v. Kansas*, it was mistaken either in its view of the actual bearing of that case or in its reaffirmation of allegiance.

The case of *Byars v. State, supra*, a well-considered case, arose out of the violation of the Oklahoma eight-hour law, also in connection with a contract for public work to be paid for by special assessments against the property benefited, and the same contention was made against the constitutionality of the law as is made in this case. That the court acted advisedly and did not overlook that point is shown by the following language:

"Counsel for the defendant contend: That under the terms of this statute, under the guise of a police regulation when it is not so in fact, the right of the employer and employee to contract is abridged in such a manner as to be an infringement upon the constitutional rights of both parties. That said statute is invalid because it contravenes the fourteenth amendment to the Constitution of the United States, and that 'the contract for paving is not entered into by and on behalf of the city of Guthrie.' The city of Guthrie as a municipality is acting simply as an agent of the property owner, whose property abuts on the streets along the proposed improvement. While the city has supervisory power over the streets, the improvement as shown by the statement of facts is to be paid for solely by the property owners. Work of the kind mentioned therein does not come within the purview of the statute. Work in behalf of the city would be work for which the city was liable, and which was to be paid for by the city, and not abutting property owners.' We believe the contention of counsel for defendant is without merit, and is unsupported by reason or authority. We see in this law no infringement of constitutional rights." 2 Okl. Cr. 481, 102 Pac. 804.

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The opinion discusses, approves, and follows the decision of the United States supreme court in the *Atkin* case, construes the Oklahoma statute as similar to that of Kansas, and closes as follows:

"The opening, construction and maintenance of public highways is purely a governmental function, whether done by the state directly or by one of its municipalities, for which the state is primarily responsible. And it is immaterial whether such public work is paid for by the state, the county, the city or by the benefited property owners. It is a work of a public, not private, character. The manner of payment does not change the character of the work."

In *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61, the supreme court of Missouri held valid an eight-hour labor ordinance of Kansas City, incorporated in a contract where the work was to be paid for by special assessment, and where the objection was raised by the property owner in contesting the assessment. The court expressly refused to base its holding upon the ground that such work was always done at so much an hour, but placed it on the ground that the ordinance was, in any event, constitutional, citing among others, the cases of *State v. Atkin*, *supra*, and *Atkin v. Kansas*, *supra*.

It is thus plain that there is ample authority to be found, both in state and Federal decisions, to sustain the power of the legislative body, either of the state or of the city, to prescribe a reasonable minimum of wages, even above the going rate for common labor performed on public work, and even when the work is to be paid for by special assessments against the property benefited thereby, and the courts have no power to pass upon the wisdom of the measure. We quote again from *Atkin v. Kansas*, 191 U. S. 207:

"No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the

people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed its constitutionality is beyond all question.”

The true friends of constitutional government should be the last to counsel a departure from this rule, since its strict observance seems the only antidote for a growing sentiment in favor of pure parliamentary government. Since the question is one involving the Federal constitution, it would seem that the *Atkin* decision ought to have more weight than that of the supreme court of Indiana in *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N. E. 895, 98 Am. St. 325, 61 L. R. A. 154, announced only a few months earlier than that in the *Atkin* case. The two cases present precisely the same constitutional questions, and the decision of the United States supreme court is diametrically opposed to that of the Indiana court, as quoted from at length in the former decision in this case.

The foregoing authorities make it clear that, if street improvement work paid for by special assessments is public work, performed under authority conferred by the sovereign power of the state, no constitutional guaranty is impaired by the ordinance in question. That such work is public work cannot be questioned. The power of the city to levy special assessments to pay for public work is referable solely to the sovereign power of taxation, delegated to it by the state under direction of the constitution, art. 7, § 9; Rem. & Bal. Code, § 7507, subdivs. 10 and 13 (P. C. 77 § 83); Hamilton on “Law of Special Assessments,” § 47.

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"It is axiomatic that private property may be taken for public use under the right of taxation, the power of police, or that of eminent domain. In the latter case, compensation must be made to the owner, while under the police power it is principally a matter of legislative discretion. Under the power of taxation for general governmental purposes, private property may in effect be confiscated, but under the power of special assessment, the limitation is the extent of the benefit conferred, as we shall see later. However, it is now settled in the Federal courts, and in the courts of last resort of practically every state of the Union which recognizes the power of special assessment, except Colorado, that all such assessments are laid under the taxing power." Hamilton, "Law of Special Assessments," § 49.

It is neither an exercise of the power of eminent domain nor of police power. Hamilton, Law of Special Assessments, §§ 39, 40, 44. We must not confuse the mode of payment for public work with the character of the work. We must not confound the mode of payment with an ownership or property interest in the subject-matter to which the work is applied. We must not confound the mode of taxation with the purpose of taxation. The work of improving a public street is public work and the street is a public street. The special tax is to pay for public work. The right to levy a special tax to pay for public work rests not in the citizen's property interest in the work itself, but only in the special benefit of the work to his property. The work is none the less public work, done by the city as an agency of the state, though done also in a quasi-corporate or administrative capacity as distinguished from its purely governmental functions. The property owner cannot be assessed beyond his benefit, no matter what elements enter into the cost of the work. The language above quoted from the supreme courts of Oklahoma and Kansas and from the United States supreme court thus becomes directly pertinent and determinative of the question here presented.

While cogent reasons might be advanced for sustaining legislation of this character as a proper exercise of the

police power of the state, delegated by our constitution to cities of the state, we find it unnecessary to place the decision on that ground or to discuss that question; since the state courts to which we have referred and the supreme court of the United States have sustained legislation which cannot be distinguished, either in principle or in effect, from the ordinance here in question, upon the simple ground that "it belongs to the state as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Atkin v. Kansas, supra; Gies v. Broad, supra.*

II. It is contended that, even conceding the power of the state to adopt a minimum of wages to be paid to laborers on public works carried on through the agency of its municipalities, still the city has no such power. It is argued that the ordinance is void because it seeks to declare a matter of public policy, and it is asserted that neither this court nor the city council has any power to define a question of policy. As far as this court is concerned, the truth of the claim is so elementary that it may be passed with a simple admission. As to the power of the council, the question can hardly be so summarily dismissed. It is the clear intention of the constitution to give to cities of the first class, of which the city of Spokane is one, the largest measure of local self-government compatible with the general authority of the state. Constitution, art. 11, § 10. It can "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Constitution, art. 11, § 11. By virtue of the general law, it has "all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not." Rem. & Bal. Code, § 7518 (P. C. 77 § 87). It can make "all regu-

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lations necessary for the preservation of public morality, health, peace, and good order within its limits." Rem. & Bal. Code, § 7507, subd. 36 (P. C. 77 § 83). All of these powers it assumed in its charter, adopted pursuant to the general law. As to matters of local concern, wider powers than those conferred upon cities of the first class by the constitution and laws of this state can hardly be conceived. It seems plain, therefore, that unless the ordinance in question is contrary to some public policy of the state, either expressed by statute or implied therefrom, it must be held valid. It is not claimed that it contravenes the policy of the state as declared in any express statutory enactment; but it is urged that it is contrary to public policy in that it increases the cost of public work. As we have seen, the state eight-hour law contains in itself a minimum-wage provision as to emergency overtime which is in excess of the prevailing wage. Rem. & Bal. Code, § 6572 (P. C. 291 § 115). Even exclusive of this provision, it has the effect of a minimum wage law. The prevailing daily wage in Spokane was shown to be the same for an eight, a nine, or a ten-hour day. Hence, assuming no increased efficiency by reason of fewer hours of work, the state law would either increase the number of men simultaneously employed at the same rate of pay as for ten-hour days, or would increase the number of days of employment for the same number at the same rate. It follows that it tends to increase the cost of work in exact proportion to the fewer hours in the working day. The eight-hour law manifests a public policy on the part of the state to better the condition of laborers employed upon public work. The purpose of the minimum wage ordinance is precisely the same, and the policy which sustains the one warrants the other. We fail to find wherein the ordinance in question is contrary to any public policy of the state, either as declared or implied in any statutory enactment. On the contrary, it is in accord with the policy which underlies the eight-hour law.

But it may be remarked, in passing, that it is by no means the general consensus of informed opinion that either maximum time or minimum-wage laws, not exceeding a reasonable living wage, when fairly tried out, will have the necessary effect of increasing the cost of work to any material extent, especially when applied only to public work. The evidence shows that there is no scarcity of laborers in Spokane, and it would seem that the shorter hours of labor and higher daily pay would necessarily attract many of them. The city and those doing its work by contract would thus have the choice, and could select the more efficient laborers. This would unquestionably tend to counteract in efficiency the added cost caused by shorter hours and higher pay. Contractors would, in time, learn this fact and make their calculations and bids accordingly. For a thoughtful discussion of this phase of the law, see an article in *Atlantic Monthly* for September, 1913, by James Bates Clark, Professor of Economics in Columbia University, by no means an appreciation; also, an article by Sidney Webb, in *The Journal of Political Economy* for December, 1912, page 979.

It is also asserted in the original opinion that, in its control and improvement of streets, "the city acts in its proprietary capacity," and that, where the work is paid for by special assessment, "its council is the agent of the property owner," the argument apparently being that the power of the council is limited by the strict rules of a private agency. It is true that the expressions to the effect of the first above quotation are found in many of the adjudicated cases, some of them our own, but these expressions are always stated in a qualified way. No well-considered case goes farther than to say that the city's power to improve streets is not a purely governmental function "in the strict sense." The cases usually related to the liability of the city for injuries by reason of defective streets, and the like, and the liability is the same whether the improvement of the streets was paid for out of the general fund or by special assessment against the prop-

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erty benefited. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847. It is obvious that the mode of payment does not impress a character upon the work as public or private. No distinction has ever been made between the two classes of streets so far as their public character is concerned, or so far as the quality of the city's ownership is concerned. In neither is the city's ownership of that purely private quality which is found in its ownership of public utilities built and operated by it for hire or profit, such as water works or municipal lighting plants. It is only where the work is "of private advantage and emolument" to the corporation that the city "*quo ad hoc* is to be regarded as a private company" in the strict sense. *Bailey v. Mayor etc. of New York*, 3 Hill 531; 28 Cyc. 125. On the other hand,

"Public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrong-doers, the construction of highways, the protection of health and the prevention of nuisances." *Hart v. Bridgeport*, 13 Blatchford, 289, 293.

These authorities are cited with apparent approval in *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834, 24 L. R. A. (N. S.) 1275. That case can, therefore, hardly be considered as authority for the claim that street work, however paid for, is not public work. It would seem that, as to the control and improvement of its streets, the functions of the city partake of both the governmental and corporate qualities; governmental, in that the power and duty to open and improve the highways rests primarily in the state as an attribute of sovereignty, and is delegated by it to the city as a governmental agency of the state; corporate, in that the streets of the city, in addition to being a matter of public concern to

the people of the whole state, like other highways, are also of more intimate concern to the corporate community as such. But the discussion of this phase of the question would seem to be largely academic, since, even if the work be considered purely a matter of private concern to the city, it, like any other person, can prescribe the terms upon which it will contract.

It is true, also, that it is sometimes stated that the city, in making improvement and levying special assessments to pay therefor, is the agent of the property owner.

"These statements are, however, mere dicta, representing an analogy but not a principle. The municipality is the superior imposing a tax, not an agent binding a principal by contract. Wherever the question becomes a practical one, it is held that the public corporation or quasi corporation is not the agent." 1 Page and Jones, *Taxation by Assessment*, § 16.

It is obvious that the agency is merely conventional and lacks nearly all of the elements of an ordinary agency. The authority does not emanate from the supposed principal. The work is not that of the supposed principal. He cannot discharge the supposed agent, nor direct the agent in the performance of the work. He pays for the work by an enforced, involuntary charge as he pays other taxes.

"While the general theory of assessments for benefits presents some points of resemblance to quasi-contract assessment is not a form of quasi-contract other than as taxes generally are." 1 Page and Jones, *Taxation by Assessment*, § 18.

It seems more exact to say that the council is the agent of the law, both in letting the contract and in levying the assessment. Hamilton, *Law of Special Assessments*, p. 400; 1 Page and Jones, *Taxation by Assessment*, § 19. As we have seen, the power to levy the special assessment is traceable solely to the taxing power of the state. In the absence of constitutional or statutory restraint, this power is subject to no other fundamental limitations than these:

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"It must be for a public purpose, as taxation can be exercised for none other; the property upon which the charge is laid must be peculiarly and specially benefited by the work; and the charge must be apportioned according to the benefits by some reasonable rule, and must not exceed such benefits." Hamilton, Law of Special Assessments, § 54.

In the absence of some special provision that the work must be let to the lowest bidder, it would seem that the property owner whose property is assessed for a special improvement, *but only to the amount in which it is benefited* thereby, would have no more right to complain of the effect of a maximum-hours law or a minimum-wage law, as increasing the cost of the work, than would a general taxpayer where the work is to be paid for out of the general fund. Indeed, it would seem that he has less reason to complain, since, in theory at least, he gets a direct *quid pro quo* for the expenditure, while the general taxpayer does not. It will be noted that the quotation from Hamilton in the original opinion is guarded in this respect. We quote again the part stating the condition upon which such provisions have been held to invalidate the assessment:

"Where contracts for local improvements are required by law to be awarded to the responsible bidder offering to do the work for the lowest sum, any provision in the specifications tending to increase the cost and make the bids less favorable to the property owners is illegal and void. Such provisions are commonly restrictive of the hours of daily labor that men employed by the contractor may work, or forbidding the employment of Chinese or alien labor, or fixing the minimum rate of wages. Whatever form this restriction assumes will be disregarded by the courts, if the conditions increase the cost of the work to the taxpayers." Hamilton, Law of Special Assessments, § 542.

Obviously, if it is left to the discretion of the council to determine what elements of cost shall enter into the work, and whether the work shall be done by contract at all, or whether by the city itself and the cost assessed to the property benefited, and, if done by contract, there is no requirement that

it be let to the lowest bidder, then the rule stated by Hamilton would have no application. So long as the council acted in good faith, a general law or a general ordinance not unreasonably increasing the cost of the work, would not invalidate the assessment.

But it is claimed that "the charter of the city of Spokane provides that contracts for work of the kind here undertaken shall be let upon competitive bids. It is also the policy of the state, as declared by the legislature, that all contracts for local improvements shall be done by contract upon like bids." *Malette v. Spokane*, 68 Wash. 587. As to the second statement above quoted, we have been cited to no statute of this state or legislative declaration of any kind requiring work by cities of the first class on local improvements such as here undertaken to be done by contract upon competitive bids, or directing that it must be done by contract at all; and diligent search has failed to reveal any such statute. On the contrary the statutes, Rem. & Bal. Code, § 7507, subds. 10 and 13 (P. C. 77 § 83), declare:

"Any such city shall have power—

"10. To provide for making local improvements, and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof.

"13. To determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous, or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor;"

and that (Rem. & Bal. Code, § 7560):

"Any city of the first class having authority to provide for making local improvements and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof; and to determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor, may exercise such authority by general or

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special ordinance or by general and special ordinance jointly;"

and that (Rem. & Bal. Code, § 7567):

"Cities of the first class shall by ordinance prescribe the method by which this act shall be put into operation, and any provisions herein which may be made applicable to existing delinquent assessments may be extended by ordinance to them."

See, also, the following sections of the statute: 5802, 7518, 7529, 7530, 7531, 7570, 7572, 7578, and 7894. These statutory provisions all indicate a clear intention to leave the whole matter of making such improvements in cities of the first class to the discretion of the city, subject to its charter provisions. In the absence of some statute directing that the work shall be done by contract, any city may do it either by contract or through its own officers, and assess the cost against the abutting property in proportion to the benefits.

"It was not essential that the town should let any contract at all for doing the work. We see no reason why it could not have made the entire improvement through its own officers and assessed the cost thereof on the property fronting upon the streets in proportion to benefits. We find nothing in the statute which forbids it." *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353.

The right of a city to include in assessments items not fixed by competition has been sustained by this court. For example, interest in case of reassessment (*Northwestern & Pacific Hypotheek Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Philadelphia Mortgage & Trust Co. v. New Whatcom*, 19 Wash. 225, 52 Pac. 1063; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742); engineering expenses and the like (*In re Jackson Street*, 62 Wash. 432, 113 Pac. 1112; *In re South Shilshole Place*, 61 Wash. 246, 112 Pac. 228). It would seem that the discretion of the city, in so far as not controlled by its charter, and, so long as it is exercised in good faith, and not in such manner as unreasonably to increase the cost of the work, will not be interfered with.

As to the second claim, we fail to find any provision in the charter of Spokane providing that such work must be done by contract. That matter is left to the discretion of the city council or board of public works, and when it is decided to do the work by contract, there is no provision that it shall be let to the lowest bidder. The provisions applicable are as follows:

"Sec. 97. The board of public works shall have exclusive charge of the improvement and extension of all streets and alleys. They shall have charge of improving or altering all sewers. They shall have charge of the water works and all improvements and changes in the same. They shall have charge of laying all water pipes and doing everything that pertains to the conduct of the water works and the water supply system of the city. They shall also have charge of all things pertaining to the drainage of the city. They shall have charge of all bridges and the erection and improvement of the same. They shall have charge of the employing of all persons in discharge of the duties herein mentioned. They shall have charge of the erection and improvement of public buildings and the inspection of private buildings.

"Sec. 98. When it shall be decided to do work by contract, they shall advertise at least ten days in two daily newspapers of the city for bids, accompanied by a certified check to an amount to be fixed by the board and named in said advertisement, not exceeding 10 per cent of the estimated cost of the work, reserving the right to reject any and all bids; *provided*, that in all contracts awarded, in which the probable amount of expenditure would exceed \$1,000, the publication shall be made for a period not less than twenty days. If the mayor and city council shall by resolution declare an emergency to exist, the publication herein provided for may be dispensed with.

"Sec. 99. The board shall have charge of all public works of every kind, where not otherwise provided for in this charter, and charge of furnishing all material and supplies for such work, and shall report to the city council such work, as it shall deem necessary and proper to be performed for the city, and if the council shall concur with the board, the board shall have power to enter into contracts therefor and for the per-

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formance of such other public works, as may be authorized or directed by the city council.

"Whenever proposals for supplies for work shall be advertised to be let to the lowest bidder, a specified day and hour shall be named, when such bids shall be opened. Such bids shall be made in duplicate, one to be furnished to the mayor and one to the clerk of the city commissioners, and such bids shall be accompanied by an affidavit of the bidder, that the same is made in good faith, and there is no collusion or understanding between him and any other bidder on such work. Such bids may be handed in any time before the hour designated for opening the same; and all bids, original and duplicate, shall be opened at the hour named, in public and in the presence of such persons as may see fit to attend such opening of bids. As soon as the bids are opened, the clerk or other officer with whom the same are filed, shall, in the presence, of the board or officer opening them, record the same in a book kept for that purpose; *Provided*, nothing herein shall be construed to prevent the rejection of any or all bids tendered, when so deemed to be proper."

It will be noted that the board has the power to reject any and all bids, and that it is only in connection with proposals for supplies that the lowest bidder is mentioned at all. There is apparently a discretion, even in that case, as to whether the advertisement shall be for letting to the lowest bidder or not. These charter provisions are far from being of that mandatory character which would override the general statutes of the state or general ordinances of the city, applicable alike to all work whether done by contract or not. Since the work might be done without letting a contract at all, it is plain that the competitive principle would have no such drastic application as to prevent the city from providing reasonable conditions under which the work might be done, even though such conditions tended in some degree to modify competition in some particular.

III. Finally, it is urged that the ordinance is unreasonable, and, in its last analysis, the opinion on the first hearing rests upon the initial assumption that any minimum of wages materially above the prevailing rate is unreasonable *per se*.

With this we cannot agree. The reasonableness of an ordinance is always open to review by the court where it is passed under the general powers of the city and not in direct response to a statutory direction; but, even in such cases, the ordinance is entitled to a presumption of reasonableness until the contrary is made to appear to the court in some manner. Judge Dillon lays down the following rule:

"But the power of the court to declare an ordinance void because it is unreasonable is one which must be carefully exercised. When the ordinance is within the grant of power conferred upon the municipality, *the presumption is* that it is reasonable, unless its unreasonable character appears upon its face. But the courts will declare an ordinance to be void because unreasonable *upon a state of facts being shown* which makes it unreasonable. If the ordinance is not inherently unfair, unreasonable or oppressive, the person attacking it must assume the *burden of affirmatively showing* that as applied to him it is unreasonable, unfair and oppressive." 2 Dillon, *Municipal Corporations* (5th ed.), § 591.

The court, in such cases, will take notice of existing conditions and circumstances, and if it cannot say that the ordinance is, on its face, unreasonable in view of all of the conditions, it will not declare the ordinance void for that reason. 1 Dillon, *Municipal Corporations* (4th ed.), § 27.

"Courts, in passing upon the reasonableness or unreasonableness of a statute, and deciding whether the legislature has exceeded its powers to such an extent as to render the act invalid, must look at the terms of the act itself, and bring to their assistance such scientific, economic, physical, and other pertinent facts as are common knowledge and of which they can take judicial notice." *State v. Somerville*, 67 Wash. 638, 122 Pac. 324.

See, also, *Miller v. State of Oregon*, 208 U. S. 412.

We will take notice of the fact that the cost of living, even as contributed to by the actual necessities of life, has greatly increased within the past few years, and that this increase has been out of proportion to the increase in the prevailing wages of common laborers. It is admitted that, if the ordi-

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nance was reasonable, it is valid; but counsel insists that, as there exists no direct statutory enactment authorizing its passage, the ordinance must be shown to be "reasonable within the meaning of that term as applied to the judicial mind." It would be more exact to say that the burden is even then upon those attacking the ordinance to show that it is unreasonable. Aside from its recognition of constitutional and statutory inhibitions, the judicial mind is not different from any other mind. It must consider the circumstances, the purposes, and the reasonable tendency of the ordinance to meet such purposes. If the purpose is lawful, and the means reasonable, the ordinance cannot be declared invalid. The seventh biennial report of the commissioner of labor of this state, for 1909-10, presents a table bearing on the cost of living, which was cited at the second but not at the first hearing of this case. The commissioner, on pages 39 and 40, referring to this table, says:

"Prices for 1900 are given as a base and increases or decreases in the cost of the different commodities considered are shown for a period of years terminating with 1910. For the latter year, a final comparison is presented with prices quoted in 1900.

"An analysis of the tabulations supplies abundant evidence in support of the common conviction that the cost of living is advancing out of proportion to increases in compensation paid to wage earners. Moreover, it is important to note that in the list of commodities which have advanced most rapidly are included such staples as rye, graham and wheat flour, rice, eggs, lard, beans, ham, bacon and fresh meats, the average increase in cost of the above commodities for the period mentioned being 72 per cent."

The commissioner also states (biennial report for 1909-10, p. 6) that, from all of the assembled facts, and as a result of the investigations of the bureau, it is evident that wages have failed to keep pace with the advance in living expenses. This is also a matter of common knowledge. *There was no testimony to the contrary.* In view of these conditions, can any

one say that a wage of \$2.75 a day, is, as a matter of law, more than a reasonable living wage? The unit, as applied to the problem of living, is the family, not the individual, and \$2.75, or even \$3 a day, can hardly be complacently pronounced as an unreasonable sum for supporting such a unit. (It may be remarked, in passing, however, that a comparison of the later with the earlier ordinance, which it does not repeal, indicates that it was probably never intended to apply to work done on the local improvement plan.) To hold that the payment of any sum which we cannot say is above a reasonable living wage, though it may be above the prevailing rate of wages, is a mere gratuity, would be to sacrifice the fact to a mere term. Such a holding would be an indictment of our civilization.

The judgment of the lower court is affirmed.

It is but fair to the members of Department One to say that the controlling questions in this case were much more thoroughly briefed and discussed on the rehearing than on the first presentation.

MAIN, MORRIS, and FULLERTON, JJ., concur.

PARKER, J. (concurring).—Upon more mature consideration, I am constrained to concur in the foregoing opinion, though it overrules the decision rendered by Department One, in which I concurred. I was led to entertain the views expressed in the former decision because it then seemed to me that there was a distinction to be drawn between work done by the city to be paid for out of its general funds, and work done under the supervision of the city officers to be paid for by special assessment against the benefited property; in that the former constituted an act of the city in its own behalf without any element of agency being involved, while the latter constituted an act of the city officers as agents of the property owners who were to pay for the improvement by special assessment against their property. However, a review of the authorities cited in Judge Ellis' opinion convinces me that no

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such distinction can be rested upon sound legal grounds. The notion of agency on the part of municipal officers for the property owners in the making of local improvements, somewhat loosely expressed in the decisions of the courts, I apprehend, for the most part, arose from the fact that, in the early history of local improvements and assessments, they were not made save by consent of the property owners or some considerable majority of them; this, not for want of legislative power to provide otherwise, but because of legislative restrictions against forcing such improvements and assessments upon property owners except by consent of some specified majority of the owners of the property within the particular district involved. Under existing laws in this state, such improvements and assessments can be lawfully made even against the will of all of the property owners of the district involved. This being true, I am now of the opinion that the officers of the city, so far as their powers are concerned, do not represent the owners of property to be assessed for local improvements in any different capacity than they represent the general taxpayer when carrying on a public work for the city to be paid for by general taxation, and that the former is as purely public work as the latter.

The review of the statutory and charter powers of Spokane relative to the making of local improvements and assessments, made by Judge Ellis, seems to render it plain that such improvements are not required to be done by contract, nor to be awarded to the lowest bidder when done by contract, so far, at least, as labor is concerned; so that the element of competition in that regard is not, by law or charter, required in the making of such improvements any more than when the city employs a servant in any capacity. This problem, it seems to me, in its last analysis, is simply a question of the power of the city, through its duly constituted officers, to contract for public work involving the discretion of such officers to pay or cause to be paid reasonable compensation for such work. Viewed in this light, I am of the opinion that it was

not an abuse of discretion on the part of the city authorities to fix the minimum compensation of laborers employed upon public work of the city at the amount they did by the ordinance here involved.

At the former hearing, having in view a distinction between work done by the city at the expense of the general taxpayers and work done by the city officers at the expense of special assessment payers, and that the latter partook of the nature of private work between employer and employee, which I now concede to be erroneous, and the argument of counsel being then directed largely to the city's police power, I was convinced that the city possessed no such police power as would enable it to fix a minimum wage as between private employer and employee. Whether the state, by legislative enactment, may not fix a minimum wage as between private employer and employee, is quite a different question, as to which I refrain from expressing an opinion at this time. But I do not think the question of police power is involved in this case at all—no more than it is when the city employs a servant and fixes his compensation. Should the compensation so fixed be clearly excessive, a taxpayer may have the right to interfere by proper proceedings in court, just as he would have the right to so complain were the city buying supplies and paying a clearly excessive and unwarranted price therefor. I am not able to see that the property owner paying a local assessment would have any different or higher right to complain. I apprehend, however, that such unwarranted use of public funds by the city authorities would have to be of such a flagrant character that reasonable minds could not differ relative thereto before the courts could be induced to interfere. We have no such case here.

I am free to say that, upon the former hearing, I was as fully convinced of the correctness of the views expressed by the writer of the opinion as he was himself; but more mature consideration of the real question involved has led me to the

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views I here express, and I therefore concur in the foregoing opinion.

Crow, C. J. (concurring)—I concur with Judge Parker. Although I signed the former opinion, I am now convinced that the judgment of the trial court should be affirmed.

Gose, J. (dissenting)—I still adhere to the conclusion reached by the court at the first hearing. *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005. The concrete question presented is, Can a city arbitrarily fix a minimum wage, approximately twenty-five per cent in excess of the current wage, and assess the same against the property benefited by the improvement upon which the labor has been performed, in the absence of express or clearly implied authority from the state? In my opinion it cannot do so.

"Courts will review the question as to reasonableness of ordinances passed under a grant of power general in its nature or under incidental or implied municipal powers, and if any given ordinance is found unreasonable will declare it void as a matter of law." McQuillin, *Municipal Ordinances*, § 182.

The power of the state itself to fix a minimum wage is not before us, for it has not as yet legislated upon that subject, nor has it expressly delegated the power to cities to do so. The needs of the laborer resulting from the higher cost of living are beside the question. Upon that subject, I raise no issue. The question is, Shall the reasonableness of the ordinance be measured by the current wage, or by what the court conceives the current wage ought to be? I think the former must be the test until the state itself has definitely spoken. Up to the present, it has never been held, to my knowledge, that a city may make a donation to a citizen under color of law, and assess the bounty against the property of an objecting owner. I cannot escape the conclusion that a payment for a public work, twenty-five per cent in excess of the price at which other citizens stand ready to do the work, where the

work is done by the city upon the assessment plan, is, in the absence of clear statutory warrant, in the nature of a bounty. If the city may fix a minimum wage largely in excess of the current wage, it may, with a like consistency, fix a minimum price for all material that enters into a public work, for the larger part of the cost of most material is human labor; and the man behind the brick and cement—that is, the man who furnishes the labor to put it into usable form—is as worthy of legislative protection as the man who puts it down. Whether the council is the agent of the property owner, as Judge Chadwick concluded, or the “agent of the law,” as Judge Ellis concludes, where it acts under a general grant of power, its acts must be subjected to the test of reasonableness. Until the state has definitely declared a policy fixing a minimum wage upon all work done for it and its members, whether paid for by general taxation or by assessment upon the property benefited, I feel constrained to take the view that an ordinance like the one in question is unreasonable.

I have contented myself with a brief statement of my view because the subject was fully treated by Judge Chadwick following the first hearing. I therefore dissent.

MOUNT, J.—I concur in the view expressed by Judge Gose.

CHADWICK, J. (dissenting)—I concur in what is said by Judge Gose. The result of the court’s decision is, that a city council can, in order to meet what it conceives to be the living expenses of a citizen, arbitrarily take from the substance of one man and give it as a bounty to another, and that, without measuring or even considering the ability of the subject of its impressment to pay the tax.

The opinion of the court has taken a wide range, but it should be borne in mind that we did not in our former opinion hold the ordinance to be unconstitutional. We did not hold that the legislature might not, by general law, authorize a city to pass the ordinance in question. We

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did not hold that a city could not, by charter amendment, provide for the payment of a minimum wage higher than, or even unreasonably higher than, the current or going wages. We did not hold that a city could not fix a wage scale to be paid its employees out of the general fund, or that it could not fix the hours of labor. Our holding was, in its essence, no more than this: that an agent is bound to do for his principal, when pursuing the trust relation, as well as he could have done for himself. Until the decision in this case was pronounced, this principle had been regarded as fundamental.

It may be inferred from what is said in the majority opinion that we held the ordinances of the city of Spokane fixing a minimum wage to be unconstitutional. In the former opinion, the constitutionality of the ordinances was not questioned. The judges who participated in that decision, with one exception, had no doubt that such ordinances, if properly passed, would do no violence to any constitutional guaranty of personal or property rights.

There is, and there can be, but one question for solution: that is, whether an ordinance, passed without the sanction of a general law passed by the legislature and approved by the governor, which fixes a wage from twenty-five to forty per cent higher than the current wages for like labor in the same place, can be taxed against an unwilling citizen without violating that fundamental principle of the law that municipal ordinances must be reasonable. We held, under the facts of the case before us, that the difference was so great that the ordinance was in its operation unreasonable. We did not hold or preclude ourselves from holding under a different state of facts, that the wages fixed by the ordinance might not be reasonable. The majority opinion seems to me to be an endeavor to meet a sociological problem with which this court can have nothing to do, for it is a legislative and political question, and the argument of the majority does not touch the premise of the question before us.

If approached at all, it is lost sight of in the assertion of these beneficent principles which are, at the present time, engaging the attention of thoughtful persons all over the world and which will in time be taken care of by appropriate legislation. In the absence of the authority to which Judge Gose has adverted, courts cannot, and should not, be influenced by the opinions of political propagandists, however engaging and however reasonable they may seem to be. Humanitarian impulses are the well-springs of social progress, but to define them and to put them into the forms of law is not the work of the courts. Their work is limited by narrower bounds, and wisely so; for people of this and all English speaking countries have undertaken, by express limitation and by the strongest implications, to keep the law making powers in the people themselves. The duty of a court is to follow the law as made by the people, and not to create a rule to meet a situation, however urgent; for the power to frame a humanitarian impulse into law (judge made) implies a power to frame a law that will usurp and cripple the rights of the people.

We have the law before us; Judge Gose has said, in his dissenting opinion, what it is: that is, that the power to do these things is in the legislature, and until it has spoken, it is the duty of the court to follow the law as it finds it. In this case, the court has followed a humanitarian impulse, and to that extent its action is to be applauded; but, in doing so, it has violated principles and commands that may invite those whose petitions should be more properly addressed to the law making powers to go to the courts and invoke the sympathy of the judges to the end that they will meet conditions not theretofore recognized by the people or by their representatives. This means but one thing, judicial legislation, which is judicial tyranny. This is especially so in this case. After the original decision was pronounced, the legislature convened in regular session. Bills were introduced in both the house and senate and an attempt was made to pass a law legalizing

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that which this court had held to be invalid. The bills were killed. The idea of taking from one and giving to another found no favor with the legislature. This fact, coupled with the decision previously rendered, would in itself be sufficient under the hitherto accepted canons of statutory construction to warrant a reaffirmation of our previous decision. To hold otherwise makes this case *sui generis*.

I want to take exception to the concluding clause of the majority opinion:

"It is but fair to the members of Department One to say that the controlling questions in this case were much more thoroughly briefed and discussed on the rehearing than on the first presentation."

I deny that the real question before the court was more thoroughly briefed and discussed on the rehearing. Every question that was properly before the court was briefed and orally argued. The former opinion of the court was given the mature consideration of every member of the court, and was sanctioned by all, with two exceptions; one dissented, and the other was uncertain at the time. The briefs submitted on rehearing were longer. They quoted from the words and works of political economists and humanitarians, but they nowhere touched the law any closer than did the original briefs. In fact, they went beyond the law, and in some particulars, as it seems to me, are open to the criticism that they are coercive; or at least, an invitation to the court to subscribe to the political side of the controversy. In this sense, they were offensive and should have been stricken. Personally, I would be glad to see every man who labors paid a fair wage, more than a going wage, for I know that wages are too often hammered down to meet the bare necessities of the wage earner; but I have not the means to pay those who should be paid more, nor have I the right, when sitting in judgment on the affairs of my fellow men, to say that my neighbor shall pay more, and that by judicial mandate.

The humanitarian or economic phase of the question is

not properly before the court, as I have undertaken to demonstrate, but since it has been discussed, I have this to say: In considering the necessity of the man who works upon a paving job, it is possible that the court has overlooked the rights and necessities of the small home owner whose property is improved against his will and who is really unable to meet an arbitrarily added cost. He may be no less a laboring man than the man who works upon a street contract. The fact that a man works for a paving contractor has not, hitherto, either in law, equity, or morals, given him a right to be considered over the man who is working in some shop or factory, or in some store or printing office, and who is undertaking to build for himself and his family a comfortable home. To this man who labors, the rule of the majority may mean loss and confiscation. A question of ethics might arise if the court had looked at both sides of the question and had been willing to see the necessities, the struggles, of the wage earner who is also the small home owner, and who is, in virtue of a court made law, made to bear a burden he had no reason to expect, and which he must have assumed to be beyond the power of the court to declare.

By what right the majority assumes to disregard the testimony in this case, and upon the report of the commissioner of labor, say what a reasonable wage is, I am at a loss to know. Courts have hitherto based their conclusions upon testimony; but assuming that the court is right, I could, if it were proper to do so, furnish documents and opinions of equal merit and of equal force to sustain the proposition that the modern tendency of our municipalities to create assessment districts, to issue bonds, to put charges upon property, to buy prosperity on credit, must, in the end, inevitably force the one who now owns a home to give it up, and at the same time, deter the one who desires to put into realization the home instinct which is dominant in the heart of every normal man. Let it be remembered that, in compelling the home owner to pay from twenty-five to forty per cent more for

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the workman the city furnishes him, than he would have to pay if he had employed the same man, and this to meet the increased cost of living, the money collected for that purpose comes in the main from those who are equally deserving and whose necessities are equally as great. The court has made the necessities of the one his fortune. It has made the trust of the other his misfortune. ,

[No. 11464. Department Two. January 2, 1914.]

COLUMBUS VARNISH COMPANY, *Appellant*, v. SEATTLE PAINT COMPANY, *Respondent*.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting oral evidence will not be disturbed on appeal where the supreme court is not able to say that the weight of the evidence demands different findings.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 18, 1913, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Douglas, Lane & Douglas, for appellant.

John W. Roberts and *George L. Spirk*, for respondent.

MORRIS, J.—Appellant brought this action, seeking to recover upon account of goods sold and delivered. Respondent filed a complicated answer, in which reference seems to be made to several defenses not altogether consistent; but, in the main, the answer is a plea that no liability should be enforced against defendant because of the failure of appellant to comply with the contract of sale in several particulars. This answer was not moved against in any way, appellant filing a reply to it, and the case proceeded to trial without a jury. The difficulty of making a clear statement of what the real issue was between the parties is best illustrated

¹Reported in 137 Pac. 434.

by the fact that the first ten pages of the record are taken up with a discussion between the trial judge and respective counsel in the endeavor to understand clearly just what issues were to be submitted to the court for determination. The issues seem to have finally narrowed down to one—whether or not respondent had complied with the agreements and the representations entering into and forming the basis of the dealing between the parties. At the conclusion of the evidence, the trial judge announced that he was satisfied that respondent had, by a great preponderance of the evidence, sustained its defense that appellant had not complied with its contract, that the goods were not as represented, and that appellant should accept a return of all goods then unsold. Judgment, however, was given appellant for a small sum, representing the result reached after the allowance of proper credits for the value of the goods sold, the value of the goods returned, and an item of freight paid by respondent.

We find no question of law involved in this case that requires any special reference or statement. The first thing is to determine what the contract was, and then whether or not it had been complied with. Like most cases where oral contracts are sought to be enforced, there is quite a conflict as to what agreements were made touching the sale of the goods, and the conflict is as broad upon the question of the quality of the goods. The record, however, is ample to sustain the findings of the lower court in these particulars, and not being able to say, after a full reading of the record, that the weight of the evidence demands different findings, we will not disturb those made by the lower court, and the judgment is affirmed.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

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[No. 11390. Department Two. January 2, 1914.]

THOMAS R. ELLIS, *Respondent*, v. CLARA B. ELLIS,
Appellant.¹

DIVORCE—GROUNDS—CRUELTY—EVIDENCE—SUFFICIENCY. A decree of divorce, asked by both parties to the action on the ground of cruel treatment, is not warranted and cannot be sustained on appeal merely because the trial judge was of the opinion that the "ends and objects of society" would best be subserved by granting the decree, where neither party produced sufficient evidence to sustain the charge of cruelty; it not being enough to show want of regard for each other, disposition to quarrel over trifles, or that they can no longer live together in peace and harmony.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 28, 1913, upon findings in favor of the plaintiff, in an action for a divorce. Reversed.

Buck, Benson & Knutson, for appellant.

Edwin H. Flick (*C. E. Hughes*, of counsel), for respondent.

MORRIS, J.—Appeal from a divorce decree. The only error assigned is insufficiency of the evidence to support the judgment. We shall make no attempt to set forth the evidence. It can be summed up in a remark made by the trial court just before its conclusion: "There is nothing in this case but a property row." The lower court, however, concluded that it was best for the parties to separate, and that there was no possibility of their again living together. But, while so believing, the evidence did not impress the court with an opinion that the fault was with either party sufficiently to entitle the other to a decree, for each party is denied relief, and the decree is granted upon the conviction of the court, "that the ends and objects of society and the

¹Reported in 137 Pac. 453.

state can best be subserved by dissolving the bonds of matrimony existing between said litigants."

The state is undoubtedly interested in any attempt to dissolve the marriage relation; but we believe that interest is because of a desire to preserve, and not destroy; and we cannot agree with the trial court that the interests of the state or the "ends and objects of society" demand a dissolution of the marriage relation of a husband and wife who have lived together harmoniously for twenty years when they had practically nothing, but when prosperity came and the wife had received a small inheritance, petty quarrels and bickerings over financial and property matters occasionally arose. Each party sought a decree against the other on the ground of cruelty. Neither party produced sufficient evidence to sustain such a charge, and the only result that should follow is a dismissal.

Whatever may be the opinion of the individual judge as to the desirability of parties continuing in the marriage relation when they have lost that mutual respect and affection which is the basis of the relation, that relation can only be legally severed when one of the parties to it is guilty of such conduct toward the other as in law constitutes a ground for divorce. It is not enough that neither party has any regard for the other. *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21. Nor can irascibility of temper, nor a disposition to quarrel over trifles, be regarded as cruelty, within the meaning of that expression in divorce statutes. *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812. Nor is it sufficient that the parties will no longer live together in peace and harmony. *McDougall v. McDougall*, 5 Wash. 802, 32 Pac. 749; *Colvin v. Colvin*, 15 Wash. 490, 46 Pac. 1029; *Stanley v. Stanley*, 24 Wash. 460, 64 Pac. 732; *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762; *Bickford v. Bickford*, 57 Wash. 639, 107 Pac. 837; *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598.

Unhappiness between husband and wife is to be deplored, but when such a condition arises between them because of

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mutual neglect, the remedy is not the courts, but reformation of individual conduct. The case being triable here *de novo*, this record has been read in the light of the complaints, and we cannot find evidence supporting the claims of either party to justify us in holding that a divorce should be granted against the other. Neither can we say that one party or the other is the cause of the situation in which we find them. The husband holds the wife blamable and the wife accuses the husband. Neither produces any corroboration worth mentioning. We are, therefore, driven to hold, as the lower court, that neither has sustained a cause of divorce against the other. We differ with the lower court only in its announcement that, under such circumstances, the best interests of society and the state demand the annulment of this marriage.

The judgment is therefore reversed.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 11137. Department One. January 2, 1914.]

NELSON CHILBERG *et al.*, *Respondents*, v. GEORGE W. AIKEN
et al., *Appellants*, WILLIAM F. BOYD, *Defendant*.¹

CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD—EVIDENCE—SUFFICIENCY. In an action to cancel a quitclaim deed, findings that the deed was procured by fraud of the grantee are sustained, where it appears that, in platting an addition, the grantor had unknowingly omitted a strip of land on the north side of his tract eighteen feet wide at one end and thirty-nine feet wide at the other, containing over an acre, through a mistake as to the true location of his line; and that, in consideration of \$20, he made the quitclaim of the strip to the adjoining owner on the north, in reliance on the representations of the grantee's agent that the strip was but three feet wide at one end and ran to a point at the other, and that the deed was wanted to settle a dispute with a third person with whom the grantee was then on the verge of litigation, which representations were all false, the grantee knowing the size of the strip and that the

¹Reported in 137 Pac. 487.

grantor was ignorant thereof and desiring to promote instead of settle the litigation; the representation that it was to settle the litigation being one of the moving considerations for the deed.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 11, 1912, upon findings in favor of the plaintiffs, in an action to quiet title. Affirmed.

Peters & Powell, for appellants.

T. F. Bevington, for respondents.

ELLIS, J.—This action was brought in July, 1910, by the plaintiffs Chilberg, to procure the cancellation of a quitclaim deed executed by them to the defendant George W. Aiken, alleging fraud in its procurement, and to quiet title against the defendant Boyd to the lands described in the deed. This case grows out of the same general transaction involved in the case of *Aiken v. Boyd*, 55 Wash. 696, 104 Pac. 1101, the transcript of the evidence in which case was, by stipulation, made evidence in this. A brief review of that case will facilitate the statement of the issues in this.

That case arose from a dispute between Aiken and Boyd as to the true location of the south boundary line of a five-acre tract of land which Aiken had purchased from Boyd. That boundary admittedly coincided with the east and west center line of section 15, township 24, north, range 3 E. W. M., the dispute being as to the true location of that center line. Lying to the south of this five-acre tract, was a tract of land which had been platted as Chilberg's addition, by Nelson Chilberg and wife, the plaintiffs in the present action. Along the north side, and as a part of this addition, was platted a street known as Smith street, or West Andover street. The dividing line between Chilberg's land and Boyd's was the above mentioned east and west center line of section fifteen. Owing to a mistake in the survey upon which it was based, Chilberg's addition, as platted, did not extend to this line, but left a strip or gore between the north boundary of Chilberg's addition (the north marginal line of West And-

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over street) and the east and west center line of section fifteen. This strip or gore belonged to Chilberg, but was not included in his plat. The defendant Boyd claimed, in the former action, and also by his cross-complaint in this action, that this strip or gore belonged to him; claiming, among other things, that, as between him and Chilberg, the east and west center line of the section is the north marginal line of West Andover street, and coincides with the north marginal line of Chilberg's addition, because it had been so determined by a survey of one Anderson upon which both had subsequently relied and acted.

In *Aiken v. Boyd*, *supra*, we held that the south boundary line of the tract which Aiken bought of Boyd was the east and west center line of the section, as established by the survey of one Gardner. The strip left between that line and Chilberg's addition is approximately thirty-nine feet at one end and eighteen feet at the other. That decision, in effect, fixed Aiken's north line an equal distance further north than Boyd claimed it was. Aiken, acting upon the Gardner survey, had insisted that the north fence of his five-acre tract should remain that distance north of where Boyd claimed the fence should be, Aiken asserting that his five acres extend only to the center section line as fixed by the Gardner survey; Boyd, that it extended to the line as fixed by the Anderson survey. It was to enjoin Boyd from interfering with this fence that Aiken brought the former action.

Before the commencement of that action, and while Aiken and Boyd were in dispute as to the true south boundary line, and, in consequence, also as to the true north boundary line of Aiken's five-acre tract, each of them approached Chilberg, endeavoring to procure from him a quitclaim deed of whatever land lay between Chilberg's addition and the east and west center line of the section. If Boyd's contention were correct, there would, of course, be no such strip. If Aiken's contention were correct, there would be a strip varying from over eighteen feet at one end to over thirty-nine

feet at the other. The evidence, in both cases, we think convincing that both Boyd and Aiken knew that, if there was in fact any strip owned by Chilberg, these were its dimensions and that they knew that Chilberg did not know that fact. That both Boyd and Aiken knew the extent of the mooted discrepancy was conclusively shown by the fact that Aiken claimed his north fence must remain that distance further north than it otherwise should have been, and that they were on the verge of a lawsuit about it.

Chilberg, up to this time, had no idea that he owned any land lying north of Chilberg's addition. Boyd first approached Chilberg, stating that he wanted the quitclaim deed merely to settle a dispute between him and Aiken, and that it made no difference to which he gave the deed. Chilberg testified positively that Boyd told him the strip in dispute was only about three feet wide. Afterwards, Aiken, through his father-in-law, one Warmouth, approached Chilberg for a deed, also stating, as Chilberg testified, that it was desired merely to settle a dispute between Boyd and Aiken; and Chilberg further testified, that he had sketched, on a piece of paper, which he showed to Chilberg, a diagram of this strip, and said that at one end it was three feet wide, and ran almost to a point at the other; that Chilberg then told Warmouth that, if it was only three feet, it did not amount to much and that he would give the deed, but would not do so if it would make any trouble between Aiken and Boyd. Being assured that it was to settle the dispute, Chilberg, for \$20, gave Aiken the deed prepared by Aiken, describing the strip as follows:

"Commencing at Geo. W. Aiken's S. E. corner and N. E. corner of N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 15, township 24 N. R. 3 East, thence south 3 feet more or less to Smith street as platted and of record of Chilberg's addition to West Seattle (now known as West Andover Street of the City of Seattle) thence west to the meander line of Puget Sound, thence northwesterly with the meander line of Puget Sound to a point due west of the place of beginning, thence east to the

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place of beginning. All land lying between Geo. W. Aiken, south line and north line of Smith street or West Andover St."

Thereafter, Aiken, refusing to treat this deed as a settlement of his difference with Boyd, litigated with Boyd the question as to the true division line between Boyd's and Chilberg's land, as determinative of the correct location of Aiken's north line, with the result above noted. Aiken thus secured for \$20 a strip of land over eighteen feet wide at one end and nearly forty feet at the other, containing about one acre, and estimated by the witnesses at from \$2,000 to \$5,000 in value. Boyd admitted that he told Chilberg that the quitclaim deed was desired to settle the dispute, but claimed that he told Chilberg that the disputed strip was 33 feet wide. Warmouth claimed that he went to Chilberg in response to a request from him by telephone, but admitted, in effect, that Chilberg told him Boyd had been bothering him for a deed, and that he, Chilberg, wanted to know the facts, and that Warmouth then told him that one White, who, it seems, at one time made some sort of a survey, said that there was a fraction there, he thought, about nine feet wide on the hill, and three feet at the bay. Warmouth also claimed that he knew nothing definite about the larger tract shown by the Gardner survey upon which Aiken was relying, though he admitted that he knew of the Gardner survey and that, before closing the transaction, he went back to Aiken, told him what arrangements he had made with Chilberg, and that Aiken then, in his own handwriting, prepared the deed, describing the land as three feet wide "more or less." It is clear that Aiken knew, when he prepared this deed, that Chilberg was acting under a decided misapprehension. It is worthy of notice that Aiken so drew the description, with a final blanket clause that would convey the larger tract and yet not undeceive Chilberg. Aiken reluctantly admitted that, at that time, he knew just where the Gardner survey placed the true line and that, if there was any strip owned by Chilberg, it was over eighteen feet wide at one end and over

thirty-nine feet at the other. Chilberg testified that, had he known the extent of the discrepancy, or that the deed was not intended to settle the dispute between Boyd and Aiken, he never would have signed the deed.

Chilberg was a witness in the other suit, and it may fairly be inferred that, during the progress of that suit, he discovered the extent of the strip or gore which he had quit-claimed to Aiken for the small consideration of \$20, and that he, about that time, taxed both Boyd and Warmouth with having deceived him. It is admitted that, before bringing the present suit, Chilberg tendered to Aiken the \$20 and the amount of taxes paid by Aiken on the land, and demanded a reconveyance, which was refused. The trial court found that Aiken procured the deed by fraud, in that it was falsely represented, on his behalf and with his knowledge and for his benefit, that the land in controversy was only a strip three feet wide, and that the deed was desired merely for the purpose of settling a dispute between Boyd and Aiken. Decree was entered accordingly. The defendants Aiken have appealed.

This seems to us one of those cases in which the facts speak the law. A careful reading of the record leads us to a clear conviction that the findings of the trial court are supported by a decided preponderance of the evidence. It is true, as appellants contend, that Aiken was buying and Chilberg was selling a contingent claim, but it is just as true that Aiken knew the magnitude of that contingency and knew that Chilberg did not know it. The evidence makes it too plain for cavil that Chilberg never intended to sell even a contingent claim to an acre of ground, and that Aiken knew that he had no such intention. When Warmouth reported to Aiken the result of his first interview with Chilberg, Aiken knew that Warmouth, his father-in-law and agent, had either wittingly or unwittingly deceived Chilberg as to the true extent of the disputed strip. We know of no rule of law or principle of equity which would countenance misrepresenta-

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tion or deceit as to the extent of the subject-matter where the title to that subject-matter is contingent any more than where the title is certain. In either event, if the deception is intended to and does result in the giving of an unconscionable advantage and in the making of a conveyance which otherwise would not be made, the culpability is the same. Aiken, knowing the extent of the discrepancy between the two surveys, and believing that Chilberg had title to an acre of ground, and knowing that Chilberg was not aware of that fact, took an unfair advantage of his ignorance of the true situation, and secured a conveyance which he could not have secured by speaking the truth. To permit him to retain the fruits of his duplicity would be a reproach to our jurisprudence.

We find no merit in the appellants' claim of an estoppel by laches in that the respondents did not assert their claim until the appellants had established the title by litigation. It is undisputed that the litigation was in progress before the respondents learned of the fraud. Moreover, the court found, on what we deem sufficient evidence, that the appellant Aiken, through his agent Warmouth, represented that the quitclaim deed was desired for the very purpose of settling the dispute and preventing litigation. It seems clear that, if the respondents had known that it would not be used for that purpose, but to promote litigation, they would never have given the deed. That representation was thus one of the moving considerations for the deed. The consideration to that extent has failed. The intended litigation on Aiken's part was, therefore, but an element in, and its prosecution a furtherance of, his original fraud. Under the circumstances, Aiken himself should not be heard to assert that litigation is a reason for condoning his fraud.

No authority has been cited in either brief, and we deem none necessary to this opinion. The questions of fact having been correctly solved by the court, the rights of the

parties here are soluble on principles of elementary good faith.

The judgment is affirmed.

Crow, C. J., MAIN, GOSE, and CHADWICK, JJ., concur.

[No. 11403. Department One. January 2, 1914.]

SCHANEN-BLAIR COMPANY MARBLE & GRANITE WORKS,
Plaintiff, v. SISTERS OF CHARITY OF THE HOUSE
OF PROVIDENCE *etc. et al.*, *Defendants*,
O. E. HEINTZ *et al.*, *Interveners*.

O. E. HEINTZ, *Appellant*, v. SISTERS OF CHARITY OF THE
HOUSE OF PROVIDENCE *etc.*, *Respondent*.¹

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—SUPERVISING ARCHITECT—EVIDENCE—SUFFICIENCY. An owner having contracted with the principal contractor for all the work for the construction of a building, is not liable to a subcontractor, who, with notice of the principal contractor's default, failed to perfect his lien, but continued in the performance of his subcontract in reliance upon the statement of the supervising architect, in charge of the work, that the owner was holding up sufficient money to pay all subcontractors, and directing him to go ahead, in the absence of any evidence that the architect was authorized to bind the owner beyond the terms of the original contract, or that notice of his statement was brought home to the owner; since the architect has no implied authority to bind the owner beyond the terms of the contract.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered January 2, 1913, dismissing an action to foreclose a mechanics' lien, upon granting a nonsuit. Affirmed.

E. V. Littlefield and *Huntington & Wilson*, for appellant.

Conner & Akins and *Müller, Crass & Wilkinson*, for respondent.

¹Reported in 137 Pac. 468.

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CHADWICK, J.—The appellant, O. E. Heintz, brought an action to foreclose a subcontractor's lien upon a certain building, constructed at Vancouver, Washington, by the respondent, Sisters of Charity of the House of Providence, a corporation. The principal contractors, Moore and Hardin, defaulted while the work was going on. Appellant performed his contract and filed a lien for the balance of the amount due him under the contract. It appeared upon the trial that plaintiff had not given the notice required by statute, and for that reason his lien failed, under the authority of the following cases: *Hallett v. Phillips*, 73 Wash. 457, 132 Pac. 51; *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083. Appellant has not appealed from this ruling of the court, but does insist that he is entitled to a personal judgment against the corporation, Sisters of Charity of the House of Providence, under Rem. & Bal. Code, § 1141 (P. C. 309 § 77), and the following cases: *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151; *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009; *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177.

The right to recover is based upon the testimony of appellant, who says:

"I got one payment from Moore & Hardin in May, 1910, and we didn't receive any more so that in the Fall of that same year the architect called me up and asked me why we didn't deliver the balance of the iron work, I remember particularly what he referred to, the window gratings and the area gratings around the building, and I told him I had heard Moore & Hardin were in financial distress and I didn't know whether to go ahead, and he said 'I am holding back enough money to protect the sub-contractors,' he said \$20,000 he was holding back, that was along in December, the last part, I think, or some time during the month of December. Q. He said he was holding back \$20,000 to protect the sub-contractors? A. Yes, he said he was holding back \$20,000 to protect the sub-contractors. Q. State

whether or not he requested you to go ahead. A. Yes, he said 'Go ahead and finish the work,' and he was holding back that amount of money to protect us. Q. And did you go ahead on the strength of that? A. Yes, we went ahead on the strength of that;"

and the testimony of two other subcontractors, who testified to the same circumstance, one of them saying:

Q. "Did you ever have any contract with the architects, or either of them, or with Sister John, with regard to your continuing the work? . . . A. I don't know what you would call a contract; I had a conversation with them in regard to continuing work, in fact, I intended to quit work because I couldn't get any money to carry it on and I spoke to the Sisters and to the architect in regard to it, to carrying on the work, and they told me to go ahead, that all contracts and sub-contracts would be paid in full."

A judgment of nonsuit was entered upon the motion of the defendant, the Sisters of Charity of the House of Providence. The court below held, and we believe properly, that the showing was wholly insufficient to hold the respondent to an original promise. It had contracted for all the work, and appellant had become a subcontractor, having within his power and within his means remedies to protect himself and secure the payment of his demand. He had notice of the default of the principal contractors, and if he had intended to rely upon a contract with the respondent, it would seem that he would have contracted with it direct rather than continue and rely upon his lien as he did, even up to the time of trial.

The authority of an architect is not absolute. He is bound by the general rules of agency. It is nowhere made to appear in the record that the architect had any authority to bind the respondent beyond the terms of its contract with the principal contractors.

"The mere fact that a person is employed as an architect does not constitute such person a general agent of his employer, his powers as agent being limited by the contract entered into between them. Thus, unless specially authorized, he is not entitled to change, alter, or modify the contract

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entered into by the builder and his employer; nor has he any authority to bind the owner by contracts for any work done upon or materials furnished for the structures concerning which he is employed; nor is he entitled to receive notice of an assignment of payments accruing on the contract so as to charge the owner with notice thereof." 6 Cyc. 29.

See, also, 4 Elliott, Contracts, § 3614; Lloyd, Law of Building (2d ed.), §§ 11, 12. In the absence of an express contract, or compelling facts, it is never held, as a matter of law, that an architect has any implied power to purchase materials or to enter into a contract for or on behalf of the owner. His duties are well defined and well understood, and there is nothing pertaining to his engagement that is calculated to mislead any one dealing with him.

In *Campbell v. Day*, 90 Ill. 363, one Day entered into a contract to furnish material for erecting and finishing a certain building. The plans had been prepared by an architect. The work was to be paid for from time to time as the work progressed. The principal contractor let a subcontract to do all the cut stone work. The subcontractors did certain work that was not within the terms of their contract. It was contended that the architect had directed the work to be done; that the owner knew of the change and made no objection thereto. It was held that a contract having been let to complete the building, the architect had no authority to bind the owner by any promise express or implied. His duty was limited to supervision and direction of the work to be done by the contractor or those acting under him.

It is not shown that appellant ever took the matter up with the respondent, which, it will be remembered, is a private corporation, and it is not shown that it had a manager or overseer about the work, or that notice of the alleged new contract came directly or indirectly to those in authority; nor is appellant in a position to claim that he was without notice of the fact that the work he was doing had been contracted to another, and that, until notice was brought to the respond-

ent, it had a lawful right to rest upon its original contract.

Ringel v. Newman, 69 Wash. 583, 125 Pac. 943, and *Architectural Decorating Co. v. Nicklason*, *supra*, are not in disharmony with the rule laid down in this case. In the *Ringel* case, the agency could not be disputed. The son of the defendant had the construction of a building in charge for his mother, who was the owner. He was acting for her with full power. In the *Nicklason* case, the court held that, where the owner contracts directly for material, he cannot set up as a defense the fact that duplicate statements of all the materials furnished for the building were not sent or delivered to him. The authority of an architect and the scope of his agency were not discussed in either case.

In the case at bar, although the architect may have said all that the witnesses say he said, it could not be tortured into a personal promise on the part of the respondent. The architect went no further than to say, in terms or by fair implication, that no legal remedy would be lost if appellant performed his contract with the principal contractors. He did not make a new contract for the payment of money or promise a way to reach the money due on the main contract that was not already possessed by appellant. So far as the present record goes, respondent is still bound under its contract to pay Moore and Hardin. There being no lien, and no personal promise, express or implied, it follows that the judgment of the lower court is affirmed.

CROW, C. J., GOSE, ELLIS, and MAIN, JJ., concur.

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[No. 11490. Department One. January 2, 1914.]

F. L. DAVIS, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Respondent*.¹

CARRIERS—OF GOODS—LIMITED LIABILITY—CONTRACTS—VALIDITY—EVIDENCE—SUFFICIENCY. A contract to carry household goods at a reduced rate upon the shipper's signing a contract releasing the goods to a valuation of five dollars per hundred pounds, is not shown to have been unfairly made, by the fact that, when the shipper applied for rates, the agent was unable to give him any and kept him waiting several days to hear from headquarters and finally made the rate himself, presenting the receipt without explaining the two rates; and the shipper cannot claim ignorance of the contract from the fact that he did not read it, where nothing was said to mislead him.

SAME—KNOWLEDGE OF SHIPPER—FRAUD. A shipper of household goods who signs a contract releasing the goods at a valuation of five dollars per hundred pounds in consideration of a lower rate, is bound to know that there was more than one rate, and cannot say that he had no notice of the release clause, in the absence of any misrepresentations, fraud, or deceit.

SAME—CONTRACTS—LIMITED LIABILITY. Where goods had been shipped under a limited liability contract, and were held at a connecting point for prepayment of freight, a change of destination, with prepayment to the new destination at the reduced rate, does not abrogate the original contract limiting the liability, where there was a mere diversion of the goods from one point to another, and the shipper was in a position to insist upon the lower rate.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 12, 1913, upon findings in favor of the defendant, in an action to recover the value of goods lost by a common carrier. Affirmed.

O. E. Sauter and *Edward Judd*, for appellant.

C. H. Winders, for respondent.

CHADWICK, J.—On June 18, 1909, plaintiff tendered some boxes and one bundle of goods to the agent of the defendant at McMurray, Washington, for shipment to Willow City,

¹Reported in 137 Pac. 464.

North Dakota, a place on the line of the Great Northern Railway Company, it being a connecting carrier. The agent could not give the through rate on the goods. These he had to obtain by wire from headquarters. Some delay followed, and pending notice of the rate, plaintiff signed a limited liability contract releasing the goods to a valuation of five dollars per hundred pounds weight. He then went on his way, leaving the goods to follow. The goods were shipped in a few days to Everett, but were not received by the Great Northern Railway Company for the reason that the freight had not been prepaid. Plaintiff afterwards ordered the goods held pending his decision as to forwarding the goods to another place. Thereafter he went to St. Paul, and through the proper agents of the defendant, prepaid the freight charges and ordered the goods forwarded to Greensburg, Indiana. Plaintiff was given the following receipt:

"\$53.72

St. Paul, Minn. Oct. 20th, 1909.

"Received of F. L. Davis Fifty-three 72-100 dollars to cover charges now against shipment H. H. Gds held at Everett, Wash.—also prepayment for forwarding to Greensburg, Ind. and original shipping receipt with order to forward to Greensburg, Ind. Shipment as per receipt consists of 4 Bxs H. H. Gds—1 Tool Chest Ctd—and 1 Bdl. Mattresses Wpd.

J. F. Horrigan,

"Freight Claim Agent."

One box failed to arrive at its destination, and this action was brought to recover the alleged value of its contents. The court found that the lost package did not weigh to exceed three hundred pounds, and entered judgment in the sum of fifteen dollars, as provided in the release contract. Plaintiff has appealed.

It is insisted that plaintiff is entitled to recover upon two grounds: First, that the contract was not "fairly made" or "fairly agreed upon," in that appellant did not know that he was releasing the value of his goods when he signed the contract and that the contract is wanting in mutuality; and second, that appellant did not know that there were two

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rates, and that he might have shipped at a higher rate without releasing the value of the goods.

Appellant relies upon the case of *Hill v. Northern Pac. R. Co.*, 33 Wash. 697, 74 Pac. 1054. He insists that he has brought the case within the exception recognized in that case. The court there said that the contract must be "fairly made" or "fairly agreed upon." Appellant admits that he made himself sufficiently familiar with the shipping bill and the release to know that they accurately described his goods, and he then signed them. The evidence shows that he did not lack for time to read and understand the papers. No fraud or deceit was practiced by the agent.

"Q. Now, at the time you delivered those goods at the depot at McMurray, tell the court, in your own way, what occurred between you and the station agent. If there was more than one interview, tell what it was and what was said at each interview. (Objection) Now, go on and state to the court what occurred between you and the agent, and if there was more than one interview, state how many and what occurred at each one. A. I had decided to ship the goods to Willow City, North Dakota. I went down to the depot and told the agent, and I asked him, the agent, what the rate was, and he told me he didn't have it, but he would get it within a few hours. All he had to do was to wire to Tacoma. That afternoon or evening I went down, and he says 'I haven't got the rate, but I will surely have it in the morning.' I went home and boxed up my goods and took them to the depot the next morning. He had not yet received the rate but thought he surely would, and he did some growling at that time, and afterwards, because they had not paid any attention to his correspondence. It ran along that day, and I went down the next morning and he had not yet received the rate, holding me there two or three days. That evening after supper I and my son, who worked with me, before I turned the job over to him, who went down and went into the depot, and he says 'I haven't got those rates, but I won't keep you any longer. I will give you a rate for the goods, and let you go.' He wrote out the receipt and everything was blank with the exception of the stipulation (description) on the goods. I saw that he had the goods described right, and I went home and

left the next morning. Q. Was there any conversation between you and him at that time as to the contents of the agreement? A. Not a word. . . . Q. Did you, at that time, read the upper portions of that receipt, or bill of lading? . . . A. No, I did not."

Appellant's son testified substantially as follows:

"I and father went down to the depot to see about the rates and the agent said he didn't have any rates for the goods; told him he would give him a release, not hold them any longer, so he could take up his journey and leave, and ship them; said he would get the rates later on. . . . Q. Was that all that was discussed between your father and him about what the rate would be? A. Yes, sir."

To permit plaintiff to say now that he was misled into signing a release or that he was induced to do so by the agent would be to fly in the teeth of the case of *Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509. In that case, we said:

"The fact that the contract was not read or explained to the shipper, or that he was asked no questions, or that the contract was signed hurriedly, cannot be permitted to relieve the respondents from its obligations. Written contracts will prove of little avail if parties can avoid the burdens imposed, by signing in haste and closing their eyes to their contents."

Courts must rely upon men to make their own contracts, and when it is insisted that a writing has not been fairly made or agreed upon, the testimony to overcome it should be cogent and convincing. We find nothing in the record suggesting that plaintiff did not know, or, having the opportunity, might not have known, all the terms and conditions of the contract signed by him. We are satisfied with the rule declared in the *Pierson* case and adhere to it.

It would seem that our holding on the first proposition disposes of the second one also; for, if appellant had notice of the release clause, he was bound to know that there was more than one rate, for the release is executed in consideration of the charge of the lower rate. This phase of the case is also

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covered by authority. The Supreme Court of the United States, in the case of *Kansas Southern R. Co. v. Carl*, 227 U. S. 639, has passed squarely upon every question raised by appellant. In the *Carl* case, the plaintiff testified that, though he could read and write and had signed the release and had received the bill of lading, he had not read or asked any question about them and had not been given any information as to the contents of either document and had no knowledge of the existence of the two rates, and if he had known of such difference and the effect of accepting the lower, he would have paid the higher rate. There was no evidence tending to show any misrepresentation, fraud, or deceit, unless it can be inferred from the fact that the company made no explanation of the rates or the contents of either the bill of lading or the release. The shipper, as in this case, said that the bill of lading was handed to him with the release which he was asked to sign. The court, speaking through Justice Lurton, reviewed the former decisions of the court, and held that such contracts were not contracts exempting the shipper from damages resulting by reason of its own negligence, and further,—

“The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum. In saying this we lay on one side, as not here involved, every question which might arise when it is shown that the carrier intentionally connived with the shipper to give him an illegal rate, thereby causing a discrimination or preference forbidden by the positive terms of the act of Congress and made punishable as a crime. To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares deter-

mines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station: *Texas & Pacific Railway v. Mugg*, 202 U. S. 242; *Chicago & A. Railway v. Kirby*, 225 U. S. 155."

These authorities are decisive of this case unless we are to hold that the payment of the freight at St. Paul and the receipt hereinbefore set out, are to be held as a new or an original contract. We are satisfied that a new contract was not within the contemplation of the parties. The goods had been shipped and were, in legal effect, in transit. The receipt was not a new contract but was ancillary to and made in an acknowledgment of the old contract. The goods were held because the freight had not been prepaid, and because plaintiff ordered them held for a time. The legal effect of the St. Paul incident was a diversion of the goods from one destination to another. It would be highly technical to hold otherwise, especially so when appellant might, had the goods all arrived at Greensburg, have resisted any claim for an increased freight charge by referring to his original contract. No court would have denied him relief under the facts disclosed in this case, nor do we think that any court would grant him relief if the conditions were reversed, as they are in this case.

Affirmed.

Crow, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

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Syllabus.

[Nos. 8379, 8381. Department One. January 2, 1914.]

MANLEY ETTOR *et al.*, *Appellants*, v. THE CITY OF TACOMA
et al., *Respondents*.

EDWIN HOWARD *et al.*, *Appellants*, v. THE CITY OF TACOMA
et al., *Respondents*.¹

APPEAL—DECISION—REMAND—PROCEEDINGS AFTER REMAND FROM UNITED STATES SUPREME COURT. Where actions were dismissed, upon granting a nonsuit and sustaining a demurrer to the complaint, upon the single ground of the validity and constitutionality of a statute, and the judgments were affirmed on appeal without deciding any other question, the reversal of that decision by the Supreme Court of the United States, with remand for further proceedings not inconsistent therewith, does not preclude a new trial upon proffered defenses other than those passed upon on the appeals, where the decision of the Supreme Court of the United States did not pass on such defenses.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES TO ABUTTERS—LIABILITY OF CONTRACTOR. A railroad company, grading a city street, in consideration of the vacation of certain streets, in accordance with plans furnished and under the direction of the city, stands in the situation of a compensated contractor, and is not liable to abutting owners for damages on account of the change in grade, where there was no claim that the work was negligently done or not in accordance with the plans.

HIGHWAYS—CONTRACT FOR GRADING COUNTY ROAD—LIABILITY FOR CHANGE OF GRADE—RIGHTS OF ABUTTERS—CONSTRUCTION OF CONTRACT. A contract whereby a railroad company, standing in the situation of a compensated contractor, agreed with a county to grade a street, in accordance with plans furnished by and under the direction of the county, "at its own expense and without cost or charges" to the county, contemplates only the expenses, costs, and charges of making the grade conform to the plans and specifications; and hence does not include the damages to abutting owners by reason of the change of grade, after the street had been included within city limits and the contract taken over or assumed by the city; especially since, at the time the contract was entered into, the land was outside the city limits and the parties contracted with reference to the rule in this state that the county was not liable to abutters for damages from a change of grade.

¹Reported in 137 Pac. 820.

MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—EFFECT. The annexation of territory to a city *ipso facto* extends the authority of the city over the territory, under Rem. & Bal. Code, § 7449, providing that it shall thereupon be subject to all laws of the city.

SAME—ANNEXATION OF TERRITORY—EXTINGUISHMENT OF UNEXECUTED CONTRACTS. Upon the annexation of territory to a city, a contract by the county commissioners for the grading of a street in the territory annexed, not then executed, is extinguished where its execution would tend to defeat the rights of the city, and where the contract did not come within some guarantee of the constitution, unless it was acquiesced in and acted upon by the city.

SAME—PUBLIC IMPROVEMENTS—CONTRACTS—RATIFICATION—ACQUIESCENCE IN CONTRACT ON ANNEXATION OF TERRITORY. Upon the annexation of territory to a city, the city may acquiesce in an unexecuted contract made by the county commissioners for the grading of a street, where it was not *ultra vires*, and might have been made by the city; and such a contract will be deemed ratified by the city and the improvement adopted as a proper municipal improvement, although not recognized by an affirmative act by the city council, where the work was allowed to go on under the supervision of the city engineer, and with knowledge of the commissioner of public works and of the street committee of the city council, without anything being done to stop it.

COSTS—ON APPEAL—TAXATION. On the reversal by the supreme court of the United States of a decision of the supreme court of the state, the clerk of this court may refuse to tax as costs items of expenditure in the preparation of the appeal to the Federal court that were paid without the intervention of this court or the clerk's office, and which could not be checked by reference to our statutes or practice, and which appear to be taxable, if at all, in the Federal court.

On remittitur from the Supreme Court of the United States, commanding further proceedings, on appeals from judgments of the superior court for Pierce county, Chapman, J., entered April 8, and June 11, 1909, dismissing actions for damages for the original grading of a street. Reversed.

Boyle, Warburton & Brockway, for appellants.

T. L. Stiles and *Frank M. Carnahan*, for respondent City of Tacoma.

Geo. W. Korte, *H. S. Griggs*, and *H. H. Field*, for respondent Chicago, Milwaukee & St. Paul R. Co.

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CHADWICK, J.—The judgment of this court, reported in *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, and *Howard v. Tacoma*, 57 Wash. 698, 106 Pac. 481, 107 Pac. 1064, was reversed by the Supreme Court of the United States. A remittitur has come down in each case commanding further proceedings not inconsistent with the decision of that court. *Ettor v. Tacoma*, 228 U. S. 148.

The defendant Chicago, Milwaukee & St. Paul Railway Company, of Washington, and the City of Tacoma were sued by plaintiffs as joint tort feors. The liability of the railway company to respond in damages was not discussed by this court. It was argued in the briefs filed by the railway company in the Supreme Court of the United States, but that court did not pass upon the question. That court went no further in its opinion than to decide the particular question upon which our former opinions turn; that is, the validity and constitutionality of the act of the legislature of this state. Laws 1909, p. 151, § 1 (Rem. & Bal. Code, § 7815; P. C. 171 § 125). The railway company and the city filed separate answers, denying liability on grounds other than those based upon the statute of 1909. The parties defendant appeared separately, and filed briefs in this court. Their proffered defenses have never been passed upon. This being made to appear by motion, we believe that the defendants are entitled to have the questions raised by them passed upon, and that our consideration of them will not be a proceeding inconsistent with the decision of the Supreme Court of the United States.

In the year 1906, the railway company was seeking entrance into, and terminal facilities at, the city of Tacoma. It had acquired certain property for terminal uses. The property was at that time platted ground, and a part of what was known as Indian addition to the city of Tacoma. It was not embraced within the corporate limits of the city. The railway company entered into a contract with the county commissioners of Pierce county wherein it agreed that, in consid-

eration of the vacation of a part of "M" and "N" streets, in the plat of Indian addition, it would, at its own cost, grade a roadway thirty feet wide in the center of 26th street, in Indian addition. The work of grading was to be done under plans to be approved by the county engineer. These plans were prepared and submitted to the county engineer for approval. Pending the contract and the offer of the plans, a movement to bring Indian addition within the corporate limits of the city was put under way, and the county engineer suggested to the engineer of the railway company that he take the plans to the city engineer for his approval. This was done. The city engineer made some slight suggestions. He drew some marks upon the plat to indicate his ideas of what the grade should be.

In the spring of 1908, the railway company graded 26th street. The city engineer was upon or about the work from time to time. He had a copy of the contract with the county commissioners. The mayor and the commissioner of public works were aware that the work was going on, and upon one occasion, if not more, the commissioner made some suggestion with reference thereto. Some of the city councilmen, probably a minority of them, visited the work and were aware of the fact that it was being done by the railway company. The members of the committee on streets were also upon the ground, and had notice that the work was being done. In the progress of the work, a water main was broken. This was repaired by the city under the direction of the city engineer. The work was completed to the satisfaction of the city engineer, but was never formally accepted by the city. Thereafter, plaintiffs brought an action to recover damages under § 47, ch. 84, Laws 1893, p. 207, and § 48, ch. 153, Laws 1907, p. 336.

Upon this state of facts, we are of the opinion that the railway company is not liable to answer in damages. The theory upon which it is sought to hold the railway company is that the city, being a tortfeasor and having assumed to do or

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having permitted the work to be done under circumstances that would estop it to deny its responsibility and the agency of the railway company, its agent is bound to answer with the principal. It will be borne in mind that the railway company occupies no part of the street in front of appellants' property. It has done no more than improve an unimproved street according to plans approved by and under the direction of the city engineer. We do not understand that it is charged that the work was negligently done. This court is committed to the doctrine that, where work is done by a contractor for the city in accordance with plans furnished by the city under its direction, and it is not made to appear that the work has been negligently done, the contractor is not liable. *Kaler v. Puget Sound Bridge & Dredging Co.*, 72 Wash. 497, 130 Pac. 894; *Casassa v. Seattle*, 66 Wash. 146, 119 Pac. 13; *Potter v. Spokane*, 63 Wash. 267, 115 Pac. 176; *Quinn v. Peterson & Co.*, 69 Wash. 207, 124 Pac. 502; *Stern v. Spokane*, 73 Wash. 118, 131 Pac. 476. In principle, the railway company is in the same situation as a compensated contractor. It had no interest other than to do the work and to receive its compensation, which it did in property instead of money.

We notice, however, that it is said by the plaintiffs in their brief filed in the Supreme Court of the United States, that:

"When the city, by its engineer, ordered the work to be done in a certain manner, and vacated 'M' and 'N' streets, and the railway company accepted such vacation and built the grade as directed by the city, they impliedly agreed that their rights and liabilities the one to the other, should be as set out in the order of the board. One of these provisions was that the grading of the street should be at the railway company's 'own expense, and without cost or charges to or upon the said county of Pierce.' Under the statute governing the city, which by the mutual acceptance of the parties succeeded in the contract to the county of Pierce, a part of this expense so contracted to be paid was payment of compensation to the property owners. The railway company has, therefore, by proceeding as though the original order of vacation

were a contract between itself and the city, agreed to pay plaintiffs in error for the injury which they would sustain. The promise was obviously not only for the benefit of the city, but for the benefit of the property owners, and they may rely upon it in an action to recover such damages. This is not only the universal rule in the United States, but is made positive by the provisions of the Washington Code (Rem. & Bal. § 179.) that 'every action shall be prosecuted in the name of the real party in interest,' except as otherwise specially provided."

We are unable to follow the reasoning of counsel. The words "own expense, and without cost or charges to or upon the said county of Pierce," cannot be given the meaning contended for for two reasons: first, it is obvious that the expenses, costs, and charges contemplated was the cost of making the grade conform to the plans and specifications. The words "costs or charges" add nothing to the word "expense." The word "expense" is used to define the promise of the railroad company, and the words "cost or charges" are used by the other contracting party to disclaim any liability to those who might do the work. Furthermore, at the time the contract was made, the payment of damages as for compensation for property taken or damaged could not have been within the contemplation of the parties. It has rarely, if ever, been held, and certainly not in this state, that a property owner abutting a public highway owned by the county and subject to the jurisdiction of the county commissioners, can recover damages for an improvement of the highway or for a change in its grade. At the time the words relied on were written, the county had jurisdiction over the street that was thereafter improved, and the law will presume that the parties contracted with reference to the facts and the law as they existed at the time.

It is earnestly contended by the city attorney that the city is not liable for the reason that the work was done under a contract made with the county which was lawful at the time it was made; that the plans were never formally adopted; that

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the approval of the city engineer of the plat was no more or less than a suggestion which in itself was so slight that it would not bind the city; that the superintendency of the city engineer was unauthorized; that the work was never formally accepted, and that a knowledge on the part of a minority of the councilmen would not amount to a ratification or work an estoppel on the part of the city.

No cases have been cited by counsel, nor have we been able to find any, covering the exact state of facts now before us. In consequence, we are put to the stress of searching out such fundamental principles as, in our judgment, are controlling. It is settled in this period of the law's evolution that, when territory is annexed or brought into a city, the authority of the city is *ipso facto* extended over the new territory, and it becomes subject to the control and supervision of the municipal authority. Outside territory when annexed "shall thereupon become a part of such city and subject to all its laws and ordinances then and thereafter in force." Rem. & Bal. Code, § 7449 (P. C. 77 § 129); *Peterson v. Tacoma R. & Power Co.*, 60 Wash. 406, 111 Pac. 338, 140 Am. St. 936; *Railroad Co. v. Defiance*, 52 Ohio St. 262, 40 N. E. 89; *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Trustees of Schools v. Board of School Inspection*, 214 Ill. 30, 73 N. E. 412.

It would necessarily follow that contracts, theretofore entered into by the legislative or administrative body having jurisdiction over the new territory, and not then executed, or if of such character that their execution would be inconsistent with or tend to defeat the contracts, rights, powers, and duties of the annexing municipality, and not coming within some guarantee of the constitution, should be held to be extinguished by the act of annexation. The case of *Peterson* is controlling in principle. We there held that, where the limits of a city were extended so as to take in a part of a street railway then being operated through the city and upon a public road beyond the city limits under franchise from the

county commissioners, the franchise was abrogated by the annexation and that the railway company was bound to carry passengers within the limits of the city as extended for one fare of five cents, as then provided in its contract with the city and as evidenced by an ordinance.

The city was not bound to act upon or acquiesce in a contract made by the county with the railway company; but the contract that was made was a lawful one, and might have been entered into by the city on its own account. This court has frequently held that, where a contract is not unlawful and for that reason *ultra vires*, the city will be bound by the same rules which govern individuals in dealing one with another. *State ex rel. Maddaugh v. Ritter*, 74 Wash. 649, 134 Pac. 492; *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226; *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999; *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420, 75 Pac. 984; *Coliseum Inv. Co. v. King County*, 72 Wash. 687, 131 Pac. 245; *Turner Inv. Co. v. Seattle*, 70 Wash. 201, 126 Pac. 426, 41 L. R. A. (N. S.) 781.

There is much confusion in the books in applying the principles of ratification and estoppel to municipal corporations. We confess our confusion in determining upon which ground we should rest our decision. We believe that it may be rested upon either ground, but more securely upon the ground of ratification. That an unauthorized contract may be ratified by a city will not be denied, and needs no citation of authority. The only question for us is whether the conduct of the city has been such as to make a ratification. We think there was sufficient notice to the various administrative officers of the city to make it chargeable with knowledge of the fact that the work was going on, it having extended, as we now remember, over a period of two or three months. The contract with the county was a matter of public record. The city might have disclaimed the contract and denied the right of the railway company to proceed. A city is not bound to accept the encumbrance of an executory contract when an-

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nexing territory, but it may do so. For the purposes of this argument, we will assume, as the city attorney insists the fact to be, that the city council did not, by any affirmative act, ratify the contract under which the work was done. But it does not follow that the lack of an affirmative act will exempt the city. It may be bound by its inaction. It may be bound by a vote of its council, by the acceptance of benefits, by paying for services in connection with the work, or by bringing an action at law upon the contract, or by mere silence. *McQuillin, Municipal Corporations*, § 1258. But it does not follow that the city can escape the payment of damages, if any there be. The contract made by the county measures the relative rights of the city and the railway company. Not having arrested the work pending an assessment of damages, the city must be held to have adopted it as a proper municipal improvement and cannot now assert that it was not done under its authority. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820. Under the law, as the Supreme Court of the United States has declared it to be at the time the work was done, the city must meet its liability.

In taxing the costs on appeal to the Supreme Court of the United States, the clerk of this court disallowed certain items that were expended in the preparation of the appeals. There is no statute covering the taxation of costs in a case like this, and we think the clerk did not err when he refused to tax items of expenditure as costs that were paid without the intervention of this court or of his office and which cannot be checked by reference to our statutes or to our practice in cases appealed to this court. If the items complained of are properly taxable, it would seem that they should have been so taxed in the other court. The order taxing costs is approved.

The *Ettor* case comes here from a judgment of nonsuit and dismissal. It will be remanded for a new trial.

The *Howard* case comes here from a judgment of dismissal entered upon a refusal to plead further after the entry of an

order sustaining a demurrer to the complaint. It will be remanded with instructions to overrule the demurrer and for further proceedings.

Crow, C. J., Gose, Ellis, and Main, JJ., concur.

[No. 11245. Department Two. January 5, 1914.]

EMIL HENDRICKSON, *Respondent*, v. SIMPSON LOGGING
COMPANY, *Appellant*.¹

APPEAL—DECISION—LAW OF CASE. Where a judgment of nonsuit was reversed on appeal, and on a new trial on substantially the same evidence, a verdict was rendered for the plaintiff, the judgment will be affirmed, where the only question involved was whether the evidence was sufficient to carry the case to the jury.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 22, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a logger. Affirmed.

Ballinger, Battle, Hulbert & Shorts and *Charles F. Munday*, for appellant.

Frank E. Green and *Brady & Rummens*, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages for personal injuries which he alleges resulted to him from the negligence of the defendant. The cause was before us upon a former appeal, from a judgment of nonsuit in favor of the defendant, rendered by the superior court upon a former trial, at the close of the evidence introduced by the plaintiff. That judgment was reversed by this court, and the cause remanded for new trial. *Hendrickson v. Simpson Logging Co.*, 69 Wash. 72, 124 Pac. 395. A new trial in the superior court resulted in verdict and judgment in favor of the plaintiff, from which the defendant appeals to this court.

¹Reported in 137 Pac. 444.

The only question presented to us by counsel for appellant is as to the sufficiency of the evidence to support the verdict and judgment, raised in the superior court by motion for instructed verdict at the close of the evidence, and by motions made thereafter for judgment notwithstanding the verdict, and, in the alternative, for new trial. Discussion of this question would be little else than a repetition of the views expressed and conclusion reached by us upon the former appeal. We are unable to see that the facts are materially different, so far as the evidence produced in behalf of respondent is concerned, from those shown upon the former trial, which we held were sufficient to carry the case to the jury; and the evidence produced in behalf of appellant upon the second trial does not call for any different decision, as a matter of law.

The judgment is affirmed.

CROW, C. J., MAIN, and FULLERTON, JJ., concur.

[No. 11463. Department One. January 6, 1914.]

AUDITORIUM THEATRE COMPANY *et al.*, Respondents, v.
OREGON-WASHINGTON RAILROAD & NAVIGATION
COMPANY, Appellant.¹

CARRIERS—OF GOODS—CONTRACT OF CARRIAGE—AGREEMENT AS TO TIME—EVIDENCE—QUESTION FOR JURY. In an action for damages for failure to move a scenery car on time, whether there was a promise to move scheduled trains on time, is a question for the jury, where the plaintiff's manager testified that he informed the defendant's agent of the necessity of moving the car on time for an evening performance, and rather than take chances on the scheduled train being late, preferred to hire a special train, and was informed that the connecting train was a local train, made up at P. and would not be late, whereupon he paid for moving the car by the scheduled train.

¹Reported in 137 Pac. 489.

EVIDENCE—CONSTRUCTION OF CONTRACT—EXPERTS—CONCLUSION OF WITNESS. In an action for breach of contract of carriage of a baggage car of a theatrical company, whether the original contract of carriage of the advance agent was merged in a subsequent contract made by the traveling manager, is a conclusion to be drawn by the jury; and it is therefore error to allow a witness, assuming to speak as an expert as to the powers of theatrical agents, to give his conclusion that there would be such a merger.

APPEAL—REVIEW—HARMLESS ERROR. The admission of objectionable evidence that should have been stricken will not be held prejudicial, where the record fails to show any motion to strike.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 16, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Reversed.

A. C. Spencer and Hamblen & Gilbert, for appellant.

Cohn, Rosenhaupt & Grant, for respondents.

CHADWICK, J.—Plaintiffs brought this action against the defendant to recover damages for a breach of a contract of carriage. Plaintiffs Maxon and DeMilt are engaged in the theatrical business, and in November, 1911, were putting on a road show, called "Checkers." The troupe carried its own scenery and the show could not be given without it. About November 1st, Maxon, who was advance agent for the show, made arrangements with the agent of the defendant at Spokane to transport the car of scenery which the show carried from Wallace, Idaho, to Spokane, Washington. It was understood that the car would be moved on the regular scheduled train, and would arrive in Spokane on the evening of the 12th. The show was put on at Wallace on the evening of the 11th. At that time, DeMilt, who was the traveling manager of the show, called on the local agent of defendant at Wallace. He says that he made inquiry about the movement of the trains, and discussed the possibility of

the train running late; that he impressed the fact upon the mind of the agent that, if the train were to run late, it might interrupt or prevent the evening performance and entail considerable loss; that, if it were at all likely, he would prefer to and was prepared to pay the extra expense of running a special train in from Tekoa; that, upon the agent's assurance that the connecting train was a local train, made up at Pendleton and could not be late, he paid the charge for moving the car by the regular scheduled train. He was given the following receipt:

"Wallace, Idaho, 11-11-11. Received from Manager, Checkers Company, \$20 for movement baggage car Harrison, Idaho, to Spokane, Washington, trains seventeen and eight. November 12th, 1911.

\$20.00

H. A. Bard, Agent O-W R & N Co."

The agent of defendant at Wallace does not seriously contradict the testimony of the manager. The train arrived late, and the performance advertised for November 12th was abandoned. From a verdict and judgment in favor of plaintiffs, defendant has appealed.

Appellant insists that its contract was to move the car by its scheduled trains, and for any delay not attributable to its negligence—and none is shown in this case—it is not liable. This we understand to be the law; but we still think that it was within the power of the manager of the company to make a new contract for carriage by special train, if, upon further inquiry, it seemed doubtful or uncertain whether the regular train would arrive in season. He says he did not do so because of the assurance of the agent. This makes a question for the jury. We are not unmindful of the contention of counsel that an assurance on the part of the agent that the train would not be late was a mere guess upon a question which the manager could hazard an opinion as well as the local agent. This may be true, but it is nevertheless a circumstance to be considered by a jury and cannot, upon

this record, be accepted as controlling by the court. Whether a new contract was made at Wallace under circumstances which would warrant a jury in finding that there was a promise to move the scheduled trains on time, was for the jury, and the motion for a nonsuit and directed verdict were properly overruled.

When DeMilt was upon the witness stand, he was questioned and answered as follows:

"Q. An advance agent's work is generally 'known to be always subject to the revision or change' of the manager of the show? A. Yes. Q. That is a universal proposition, isn't it? A. Yes. Q. And whatever arrangements had been made prior to that with the defendant, if any had been made, it was merged into the contract that you made with the railroad company's agent at Wallace and here in Spokane? Your Honor, I objected to that on the ground that it was calling for a conclusion of the witness. The Court: I do not think so. The objection will be overruled. (Exception.) A. Yes."

This was error. Whether the contract which was made at Spokane by the advance agent was merged into the one made at Wallace, if one was made, was clearly a question to be resolved by the jury. The conclusion of the witness who assumed to speak as one having an expert knowledge of the ways of theatrical agents must necessarily have tended to deprive the defendant of the probative force of the first contract, which was admitted by plaintiffs.

DeMilt was asked, on cross-examination, if he had had a conversation with a Mr. Munson, an agent of the defendant, on the 18th of November. He answered that he had, and fixed the place. On redirect examination, he was asked and allowed to answer, over the objection of the defendant, that Mr. Munson voluntarily agreed with him that the company was to blame for the car not being on time, and that if the manager wanted to run a special it was up to the railroad company to bring the car in on a special. This was assigned

as error. Counsel say that a motion to strike the testimony was made. That it was prejudicial and should have been stricken, seems clear; but, as we read the record, no motion to strike the objectionable testimony was made. The testimony as given was improperly received, but the record is not sufficiently clear to warrant us in holding its admission to be error. It would have been proper to have asked DeMilt these questions upon direct examination, provided, of course, that a showing of the authority of the agent Munson to speak for the company, had been made. Otherwise, the testimony would be hearsay. Counsel say in their brief that an amendment was stipulated to the effect that Munson was the general agent of the railroad company at Spokane. It is not in the pleadings as certified to this court, nor do we find anything in the statement of facts with reference to it. Assuming that the pleadings were so amended, there is no evidence to sustain the allegation.

For the error found, the case will be reversed and remanded for a new trial. Reversed.

Crow, C. J., ELLIS, MAIN, and GOSE, JJ., concur.

[No. 11292. Department One. January 6, 1914.]

SIVYER & SONS COMPANY, *Respondent*, v. THE CITY OF
SPOKANE, *Appellant*.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — DISTRICTS — PROPERTY INCLUDED — "PLATTED PROPERTY" — STATUTES — CONSTRUCTION. Under 3 Rem. & Bal. Code, § 7892-13, providing that the assessment district shall include all property between the termini of said improvement abutting upon, adjacent, vicinal or proximate to the street improved, to a distance back to the center line of the block, and in case the property is unplatted, the distance back shall be the same as that included in the assessment of the platted lands immediately adjacent thereto, the term "block" was intended to refer to a square included by four streets as located by the prevailing scheme of streets in the locality; and "platted" property refers to that included by the regularly placed intersecting streets where the lands are capable of being platted; and "unplatted" lands refers to lands not so included; hence, where the next street to the north had been dedicated through only part of the abutting lands, the other portion of such lands is "unplatted," if capable thereof, and cannot be assessed back further than the immediately adjoining platted property, which extended back only half way to the next street.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 12, 1913, sustaining objections to an assessment roll, on appeal from the city council. Affirmed.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and Dale D. Drain, for appellant.

Hamblen & Gilbert, for respondent.

ELLIS, J.—This action arose upon an appeal to the superior court from so much of an order of the city council of Spokane, confirming an assessment roll for the paving of Seventh avenue from Howard street to Monroe street, as affected the property of the objector, Walter C. Sivyier & Sons Company. We reproduce from appellant's brief a plat of the improvement district which, though not introduced in evidence, was, in argument, admitted to be correct.

¹Reported in 137 Pac. 808.

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The shaded portions represent the property included in the district. The objector's property is in that part of the district north of Seventh avenue, and comprises the two tracts numbered 12 and 13 in small figures. Seventh avenue runs east and west; Howard and Monroe streets, north and south. Between these two streets, Seventh avenue is intersected only by Lincoln street, also running north and south, parallel with, and about 300 feet east of Monroe street. About the width of an ordinary city block, or 300 feet to the east of,

and parallel with Lincoln street, is a narrow street called Post street, which does not extend through to Seventh avenue, but terminates in a *cul de sac* about 150 feet north of Seventh avenue. About 300 feet east of Post street, and about 150 feet to the west of Howard street is Wall street, also running north and south to within about 150 feet north of Seventh avenue, where, like Post street, it terminates in a *cul de sac*. The first continuous east and west street north of Seventh avenue is Fifth avenue, and is over 600 feet, or a little more than two ordinary city blocks, distant from Seventh avenue. Sixth avenue, about 300 feet north of Seventh avenue, is not a continuous street. It runs from Howard street west to an intersection with Post street, where it terminates on the east side of the objector's property, and, beginning again on the west side of objector's property, it runs from Lincoln street west to Monroe street. Sixth avenue has never been dedicated or opened as a public street across the objector's property between Post and Lincoln streets, a distance of about 300 feet. All of the territory included in the assessment district and the environing property was, in 1883, platted as Second Addition to Railroad addition to Spokane Falls, now Spokane. The property lying north of Seventh avenue and between Lincoln street on the west, Wall street and Wall street extended, on the east, and Fifth avenue on the north, was never divided into lots and blocks save that the part included by a line drawn parallel to, and about 150 feet north of Seventh avenue, and by Wall street, Fifth avenue and Lincoln street, was designated on the above mentioned plat as block B. The strip 150 feet wide, lying between this tract and Seventh avenue has never been platted into blocks and lots. Seventh avenue south of this tract has been platted as Hill Park. A half block at the easterly end of the assessment district immediately north of Seventh avenue, between Howard street and Wall street, designated on the plat as block 95, and the whole block at the extreme west end of the district, between Monroe street and Lincoln street,

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designated as block 57, have been subdivided into lots. The assessment district to the north of Seventh avenue was made to include the south half of blocks 57 and 95, and a strip of about equal width to the south half of these blocks, extending from the south end of Wall street to the south end of Post street. Thence, the district extends north along the west line of Post street to a point about half way between Seventh avenue and Fifth avenue; thence east along what would be the north line of Sixth avenue were it extended across objector's property to the east line of Lincoln street; thence south to a point opposite the east and west middle line of block 57, thus including in the district property of the objector lying between Post street and Lincoln street not abutting upon, but more than half an ordinary city block distant from the improvement. None of the property between Lincoln street and Wall street north of Seventh avenue to Fifth avenue has ever been platted or subdivided into lots except by a plat prepared and long used in the county assessor's office for convenience in assessments for taxes. The trial court, on an inspection of the assessment roll, sustained the objections to the roll on the ground that objector's property could not be included legally within the assessment district. The city appeals.

The sole question presented is: Can the respondent's property be legally included in the district, under the provisions of section 13 of the act of 1911, Laws of 1911, page 446, which, so far as here material, reads as follows:

"Except in the cases herein otherwise specifically provided for and unless otherwise provided in the ordinance ordering such improvement, such district shall include all the property between the termini of said improvement abutting upon, adjacent, vicinal or proximate to the street, avenue, lane, alley, boulevard, park drive, parkway, public place or square proposed to be improved to a distance back from the marginal lines thereof to the center line of the blocks facing or abutting thereon; *Provided*, That in any case such distance back shall be at least ninety (90) feet: *And provided further*, That in

case of unplatted property, the distance back shall be the same distance as that included in the assessment of the platted lands immediately adjacent thereto. All property included within said limits of such local improvement district shall be considered and held to be the property and to be all the property specially benefited by such local improvement, and shall be the property to be assessed to pay the cost and expense thereof or such part thereof as may be chargeable against the property specially benefited by such improvement, which cost and expense shall be assessed upon all of said property so benefited in accordance to the special benefits conferred on such property in proportion to area and distance back from the marginal line of the street, or other public way or area improved." (§ Rem. & Bal. Code, § 7892-13.)

It is clear that, in enacting this law, the legislature had in mind two classes of property, namely, that platted into ordinary city blocks and usually regarded as platted property, and that not so platted. We find it unnecessary to enter into the extended discussion of decisions from other jurisdictions invited by the briefs as to the abstract definition of the word "block," since the act itself, by an unmistakable inference, leaves that question to be solved by a reference to the particular plat in which the assessment district is located. This is made clear by the proviso as to the inclusion in the district of unplatted property "that the distance back shall be the same as that included in the assessment of platted lands immediately adjacent thereto." Obviously, the legislature never intended to use the word "block" in the broad sense of a square included by four streets, how far soever apart and how large soever the resulting square, but did intend the square included by four streets as located by the system or scheme of streets prevailing generally in the environing city plat in which the given assessment district may be located. By "platted property" is evidently intended lands so included by the regularly placed intersecting streets and by "unplatted property" is intended lands not so included. Fractional blocks and irregular blocks produced by interference with the general street scheme, by the topography of the ground,

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by joining up with other additions, or by diagonal streets, would, of course, be treated as platted property. *Felt v. Ballard*, 38 Wash. 300, 80 Pac. 532. But land so situated and of such topography as to be capable of subdivision into ordinary blocks and fractions of blocks by the extension through it of the abutting streets, so as to preserve the general vicinal street scheme and make the land when so platted fairly conform to the surrounding regularly platted lands, must, until subdivided, be regarded as unplatted land, within the meaning of the act. Any other construction would leave the assessing officers without any guiding rule for even approximate uniformity, and would, in most instances, subject the owner of such property to an assessment on his property lying at a greater distance from the proposed improvement than that of other owners of adjacent platted lands in the same district and would, in many cases, subject the owner to an assessment on property not abutting on nor any part of it within a distance from the improvement equal to one-half the width of an ordinary city block. It would also subject such property in most instances to a double assessment, one for the improvement in the given district, the other for the improvement of the parallel street when extended through the property. To hold that the legislature, by the use of the word "block" and its reference to unplatted property, intended no other distinction than that between a tract of land, however large, surrounded by streets, and land ordinarily known as acreage, as contended by the appellant, would inevitably lead to the inequitable results above pointed out.

If the respondent's property were so situated by reason of the character of the ground or of other physical obstacles, or so improved as to raise a presumption that Sixth avenue would never be extended through it, the case would be different, since in such a case the respondent's property would forever escape assessment for the improvement of cross streets unless the land so rendered incapable of subdivision were

treated as a permanent, though irregular, block and subjected to assessment as such to half its depth. The justness of this distinction is plain. *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841; *Specht v. Barber Asphalt Paving Co.*, 26 Ky. Law 193, 80 S. W. 1106. Here no such case is presented. On the contrary, it is not even suggested that there is anything to prevent the extension of Sixth avenue through the tract in question.

We do not hold that the mere fact that a block is materially larger than other blocks is alone sufficient to withdraw the land therein from the operation of the statute as applied to platted lands, but we do hold that land readily susceptible to subdivision into blocks of ordinary size by a mere extension of abutting streets, which has never been so subdivided, is unplatted land.

We are of the opinion that the tract extending from Seventh avenue to Fifth avenue, and between Lincoln street and Post street extended, is unplatted land, within the meaning of the statute, and that the line of the assessment district should have been extended back upon it no further than upon the platted property on the one side and on the unplatted property on the other. This, as we understand the record, would exclude the respondent's property.

We find no error in the court's decision.

It is affirmed.

Crow, C. J., Gose, Chadwick, and Main, JJ., concur.

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Statement of Case.

[No. 10624. Department One. January 7, 1914.]

MARTIN MAGNUSON, *Respondent*, v. J. V. MACADAM *et al.*,
Appellants.¹

APPEAL—BRIEFS—TIME FOR SERVICE. A motion to strike respondent's brief, because filed out of time, will be denied when it was filed before the motion was made, and in time for service of a reply brief before the hearing.

MASTER AND SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS. A laborer on street paving work does not assume the risk, and is not guilty of contributory negligence, in obeying the order of a foreman to hold the tongue and attempt to guide a concrete mixer, which it was supposed could be moved under its own power, but which could only be moved by a team, where he was not familiar with the machine; since it was the duty of the foreman to look out for his safety and he had a right to rely upon the orders and superior knowledge of the foreman.

APPEAL—REVIEW—HARMLESS ERROR—EXPERT EVIDENCE. In an action for personal injuries to a laborer, injured in attempting to move a concrete mixer under its own power while plaintiff was holding the tongue, it is not prejudicial error to admit expert evidence of a mechanical engineer to show the force tending to move the tongue from side to side, where his competency was not questioned and objection was not made below to lack of evidence as to controlling conditions.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$4,500 is excessive and should be reduced to \$2,500, where plaintiff claimed that his left ankle was severely sprained and the instep broken down, which at times becomes swollen and prevents work at hard manual labor, and it appears that he continued at work for some days, and the evidence as to the extent of the injury was conflicting.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 25, 1912, upon the verdict of a jury rendered in favor of the plaintiff for the sum of \$4,500, in an action for personal injuries sustained by a laborer in street grading work. Reversed, unless \$2,000 is remitted.

¹Reported in 137 Pac. 485.

Alex Dickinson, for appellants.

Martin J. Lund, for respondent.

CROW, C. J.—Action by Martin Magnuson against J. V. MacAdam and Vincent L. MacAdam, copartners, to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, defendants have appealed.

Appellants have moved this court to strike respondent's answering brief for the reason that it was not served and filed within thirty days after the service of appellants' opening brief. While it is true that the answering brief was served and filed about fifty-nine days after service of appellants' opening brief, the record shows that it was served and filed before the motion to strike was interposed; that no delay in placing the cause on the calendar resulted; and that appellants had ample time within which to prepare, serve, and file their reply brief prior to the hearing of the argument on appeal. Under these circumstances the motion to strike will be denied.

Appellant's principal assignment is that the trial court erred in denying their motions for a nonsuit, for a directed verdict, and for judgment notwithstanding the verdict. Respondent was a common laborer, employed by appellants, who, as contractors, were engaged in grading and paving certain streets in the city of Seattle. Appellants brought to the work for use thereon a machine known as a concrete mixer, which weighed several tons, was operated by steam, and was supposed to have been so constructed that it might be propelled by its own motive power, although it was not equipped with any steering apparatus or appliances. The machine was mounted on wheels, the two hind wheels being on a stationary axle, while the front wheels were on an axle which worked upon a pivot. A tongue, to which horses might be hitched, was attached to the front axle in such a manner that it would move sideways only as the front axle was turned or moved.

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Respondent's evidence, and that of his witnesses, shows that, on the day of the accident, appellants' foreman desired to have the concrete mixer moved by its own power; that it was located on a concrete base of the unfinished street, which was somewhat rough or uneven; that the foreman ordered respondent and one other employee to take hold of the tongue and guide the machine while it was being moved; that respondent, who was unaware of the danger which he would thus incur, obeyed the order; that when the steam power was applied, the machine refused to move forward; that it went backward for a few inches, striking a pebble or some other obstruction, which caused the tongue to swing around and strike respondent with great violence, throwing him down and inflicting the injuries of which he complains, and that the force with which he was struck was greater than he could resist.

Respondent insists that appellant was negligent in failing to provide him with safe appliances, and a safe place in which to work; while appellants, in support of their motions, contend that all dangers incident to respondent's employment were open and obvious, or by the exercise of ordinary care and prudence could have been known to him, and that he assumed the risk of such dangers.

There was evidence that respondent had no knowledge of machinery, and that he did not know or appreciate the danger of the work in which he was engaged. Appellants were of the opinion that the mixer could be moved by its own power, but were mistaken. It was their duty to know the functions and fitness of the machine, and to appreciate the dangers to which its ordinary operation and use might subject their employees. The evidence, without contradiction, shows that the machine could only be moved by using a team of horses, and that the force applied to the tongue when the front wheels turned, would be so great as to render it impossible for the respondent and his fellow servant to hold, control, or guide it. Respondent had a right to rely upon the

orders and superior knowledge of the foreman, who represented appellants. In *Kundsen v. Moe Brothers*, 66 Wash. 118, 119 Pac. 27, we said:

“As an employee, it was appellant’s duty to obey the foreman’s orders, unless they were so manifestly dangerous that a prudent man in the exercise of due caution would refuse to obey. A servant’s obedience to the master’s orders is an absolute necessity to the successful conduct of any industrial occupation. His refusal might deprive him of employment and means of livelihood. Ordinarily a servant yields his judgment to the superior judgment and discretion of the master. If he does, and is injured by reason of his obedience to the master’s orders, it will ordinarily become a question for determination by the jury, in such an action as this, whether the danger of obeying the order was so imminent and hazardous as to charge the servant with contributory negligence and preclude him from recovering damages.”

The evidence shows that the attempt to move the machine by its own motive power was under the immediate supervision of appellants’ foreman, and that respondent acted in obedience to his specific orders. It was the foreman’s duty to look after respondent’s safety. This being true, respondent did not assume the risk, nor can he be held guilty of contributory negligence, as a matter of law. *Etheridge v. Gordon Const. Co.*, 62 Wash. 256, 113 Pac. 639; *Nelson v. Ballard Lumber Co.*, 60 Wash. 690, 111 Pac. 882; *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900. The trial court committed no error in denying appellants’ motions for a nonsuit, an instructed verdict, or judgment notwithstanding the verdict.

Appellants further contend that the trial court erred in admitting the expert evidence of a mechanical engineer, for the purpose of showing the force with which the tongue of the machine would move from side to side. The purpose of this evidence was to show whether it would be possible for respondent to hold the tongue and guide the machine as directed by the foreman. No question was raised as to the

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competency of the witness. Appellants now insist that the amount of steam applied to the engine was not shown, and that the expert should not have been permitted to testify to the force which would be exerted without considering the amount of steam involved. This objection was not raised at the trial, but is presented for the first time in this court. The expert undoubtedly took all controlling conditions into consideration. We conclude that no prejudicial error was committed in admitting his testimony.

Some objections are raised to instructions given and refused, which we find to be without merit. The instructions given fully and accurately stated the law applicable to the issues and evidence.

By their remaining assignment of error, appellants contend that the verdict is excessive. This contention must be sustained. Respondent contended that, when he was thrown down, he received a severe sprain in his left ankle, and that the arch or instep of his left foot was also injured. There was evidence showing that he continued work for some days. He insists that the work he then did was of a very light character. There was also evidence to the effect that he now suffers with what is ordinarily known as a flat foot. In other words, that the instep of his left foot is broken down and much weakened, and that at times it becomes swollen so as to prevent respondent from working at hard labor. Although the evidence as to the extent of his injury and his chances for a recovery was conflicting, we are, nevertheless, of the opinion that the verdict was excessive. At the time of passing upon appellants' motions for a new trial and for judgment *non obstante*, the trial judge was informed by appellants that they would appeal this case in any event, if their motions were denied. Thereupon, the trial judge in substance stated that he would not pass upon the amount of the verdict to determine whether it was excessive, but would permit that question to come before this court in connection with other questions that might be raised on an appeal. It was

the duty of the trial judge to pass upon appellants' contention that the verdict was excessive. His position indicates an impression or belief on his part that the verdict was excessive. We are convinced that it was, and conclude that the respondent must either consent to a reduction, or submit to a new trial.

It is ordered that, if within thirty days after the filing of the remittitur herein, the respondent shall file his written consent to accept a judgment in the sum of \$2,500, with interest from the date of trial, that judgment for that amount be entered in his favor against appellants and the surety on the supersedeas bond. It is further ordered that, in the event of his failure to make such an election within the time named, a new trial be granted. Appellants will recover their costs in this court.

GOSE, MOUNT, PARKER, and CHADWICK, JJ., concur.

[No. 11153. Department One. January 7, 1914.]

E. NICHOLSON, *Appellant*, v. W. M. NEARY, *Respondent*.¹

BILLS AND NOTES—CONSIDERATION—FORBEARANCE—NEW NOTE FOR NOTE WITHOUT CONSIDERATION. Since forbearance to sue, to constitute a valid consideration for a new promise, must be upon a "well founded claim," there is no consideration for a note given to prevent a present action upon an accommodation note given by defendant to plaintiff without consideration.

BILLS AND NOTES — CONSIDERATION — PRESUMPTIONS — BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. The *prima facie* presumption of a valuable consideration for every negotiable instrument, provided by Rem. & Bal. Code, § 3415, is not evidence, but a rule of law fixing the order of proof, and the presumption may be overcome, and the defendant may sustain the burden of proof, by the testimony of only one witness.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered February 11, 1913, upon

¹Reported in 137 Pac. 492.

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findings in favor of the defendant, in an action on a promissory note, tried to the court. Affirmed.

Belden & Losey (Henry R. Newton, of counsel), for appellant.

E. C. Macdonald and *Oscar Cain*, for respondent.

CHADWICK, J.—Respondent gave a note payable to the order of appellant and for his accommodation. Later appellant sent the note to his attorneys at Spokane for collection. Respondent was unable to pay, and upon request of the attorneys and to prevent a present action, he gave a new note for the amount due on the first note. This action was brought on the second note. Respondent answered denying consideration. After hearing the testimony, judgment was rendered in favor of respondent. Appellant was not present at the trial, nor was he a witness in his own behalf, although the court offered to adjourn the hearing until his deposition could be taken.

The fact that the original note was given for the accommodation of the appellant, and that there was no consideration therefor, is not denied in the record before us. Appellant relies solely upon the legal propositions: First, that forbearance to sue upon the first note is a sufficient consideration to support the promise of the note sued on; and second, that the proof is insufficient to show a want of consideration for the first note. Appellant quotes the rule as laid down in 6 Am. & Eng. Ency. Law (2d ed.), p. 744, where this principle is extracted from the authorities:

"If a person be possessed of a right which he may legally exercise, his forbearance at the instance of the promisor to exercise it is a valuable consideration for the promise;"

and from Pollock on Contracts, page 166:

"Consideration means not so much that one party is profiting as that the other abandons some legal right in the present."

These definitions are comprehensive and well sustained. The question recurs, is the acceptance of a new obligation for an overdue promise made without consideration and the giving up of a right to begin a present action at law, such a forbearance as will create a consideration for the new promise? We have not found a case which in its facts is exactly parallel with the one at bar, nor has any been cited. The words "well founded claim" occur frequently in the books; that is, the forbearance must pertain to a claim upon which a recovery might certainly be had or where a recovery is at least doubtful. If the claim could not be enforced in law or equity for the want of a consideration for the promise, forbearance to sue will not constitute a valid consideration for a new promise. It is not the right to maintain an action which, when given up, furnishes a consideration. It is only when a recovery, if suit were maintained, would be certain, or at least doubtful. In general, the waiver of any legal or equitable right at the request of another is a sufficient consideration for a promise, but the mere privilege of filing a complaint is not a right that can properly be called either a legal or an equitable right.

"The words 'legal right' evidently mean a right that may be enforced in a civil action." 5 Words and Phrases, p. 4080, citing *Colson v. Commonwealth*, 110 Ky. 233, 61 S. W. 46.

"The compromise of doubtful rights is a sufficient consideration for a promise to pay money, but compromise implies mutual concession. Here there was none on the part of the payee of the note. His forbearance to sue for what he could not recover at law or in equity was not a sufficient consideration for the note." *Foster v. Metts & Co.*, 55 Mass. 77, 30 Am. Rep. 504.

"If the right is not doubtful there is no consideration, for there is neither benefit to the promisor nor detriment to the promisee, and therefore forbearance or a promise to forbear to insist on a claim clearly unenforceable cannot be a consideration." 9 Cyc. 341.

A father, while in a state of intoxication, was induced to execute a note for the indebtedness of an adult son. After

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the maturity of the note, and while in a state of sobriety, he promised the holder to pay the note if he would wait until fall. It was held that the note, having been given while in a state of intoxication, was without consideration and could not be rendered valid by a subsequent promise and forbearance. The holder of the note could have made no previous demand on which a recovery could have been had. Consequently, a forbearance to sue was not a legal consideration. *Newell v. Fisher*, 11 Smed & M. (Miss.) 481, 49 Am. Dec. 66.

"It is a very ancient rule of law, that a promise to pay money, in consideration of forbearance to sue, when there is no legal cause of action, is without consideration and void." *Palfrey v. Portland etc. R. Co.*, 4 Allen 55.

A promise to pay in settlement of a controversy which has not assumed the form of a pending suit is without consideration, unless it is made to appear that there was some reasonable ground for the existence of the controversy and at least a possibility of recovery. *Allen v. Prater*, 35 Ala. 169. In *Sanford v. Royal Ins. Co.*, 11 Wash. 658, 40 Pac. 609, the court held that a wrongful assertion of a claim is no ground for compromise. That holding rests upon the principle that a wrongful claim will not furnish a consideration for the promise.

Plaintiff relies upon certain of our own decisions, namely, *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023, and *Snohomish River Boom Co. v. Great Northern R. Co.*, 57 Wash. 698, 107 Pac. 848. These cases are not contrary to, but are in line with, our present holding. In each of them the original claim was disputed or doubtful. Here it is not disputed that the note was given without consideration; that being so, the issue of an action, if it had been begun, would not be clouded by any doubt whatsoever. If counsel had availed themselves of the opportunity offered by the court to dispute the testimony of defendant that the note was given without consideration, another question might arise; but, as hereinbefore stated, this was not done, and the

case comes to us upon an admitted showing that there was no consideration to support the original promise. When controversies of this character arise between the parties to the instrument sued on, there is a growing disposition on the part of the courts to look into and through the entire transaction and to hold that a recovery cannot be had when it is sought on the sole ground that it was given in lieu of an unenforceable demand.

Finally, plaintiff insists that, however the rule may be, defendant has not sustained the burden of proof; that, under the statute, Rem. & Bal. Code, § 3415 (P. C. 257 § 47), every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and we are referred to *McKenzie v. Oregon Imp. Co.*, 5 Wash. 409, 31 Pac. 748; *Shaw v. Woodland Shingle Co.*, 61 Wash. 56, 111 Pac. 1070; *Palmer v. Huston*, 67 Wash. 210, 121 Pac. 452.

It is true, as suggested in these cases, that the burden of proof is upon one who pleads a want or failure of consideration, but it does not follow that the presumption of a consideration cannot be overcome by the testimony of one witness. It is within the peculiar province of the trial judge to measure and weigh the evidence. If he is satisfied, as he was in this case, that the note was without consideration and this, upon the faith and credit of the testimony of the defendant, it would be a usurpation on the part of this court to interfere with his findings and judgment. A presumption of fact is not evidence, but a rule of law fixing the order of proof. When proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case by competent evidence. *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870; Elliott, Evidence, §§ 91, 92, 93; Wigmore, Evidence, § 2491; *Peters v. Lohr*, 24 S. D. 605, 124 N. W. 853.

There being no consideration for the original promise, and hence no demand enforceable at law or in equity, a forbearance to sue would not create a consideration for the sec-

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ond promise; and defendant having sustained the burden of proof, it follows that the judgment of the lower court should be affirmed.

Affirmed.

Crow, C. J., Gose, Ellis, and Main, JJ., concur.

[No. 11500. Department One. January 7, 1914.]

CHARLES PORTER, *Respondent*, v. THE COUNTY OF YAKIMA
et al., *Appellants*.¹

TAXATION—PERSONAL PROPERTY — LIABILITY — DISTRAINT. Under Rem. & Bal. Code, § 9235, making personal property taxes a lien upon all real and personal property of the owner, and Id., § 9223, providing for distraint for personal property taxes upon all goods and chattels belonging to the person charged, personal property taxes are made the debt of the person assessed, and distraint is not limited to the property assessed.

TAXATION — PERSONAL PROPERTY — CONNECTED WITH A "FARM"—SITUS FOR TAXATION. Under Rem. & Bal. Code, § 9125, providing that when the owner of live stock connected with a farm does not reside thereon, the stock shall be assessed in the county where the farm is situated, the word "farm" is used in a generic, rather than a restricted sense, and includes a ranch of grazing lands used exclusively for the raising of sheep; thus recognizing the equity of the home county to have the tax.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered June 10, 1913, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action for equitable relief. Affirmed.

Harold B. Gilbert and *Sydney Livesey*, for appellants.

Englehart & Rigg, for respondent.

Gose, J.—This is a bill in equity to enjoin the sale of certain sheep, distrained by the defendants for the purpose of enforcing the collection of taxes. The defendants jointly

¹Reported in 137 Pac. 466.

demurred to the bill, on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants having elected to rest their case upon the record, a decree was entered permanently enjoining the sale and directing the cancellation of the taxes upon the treasurer's tax rolls. The defendants have appealed.

The complaint alleges that the sheep distrained are not the sheep, nor any part of the band of sheep, upon which the taxes sought to be collected were assessed. The statute, Rem. & Bal. Code, § 9225 (P. C. 501 § 215), provides that:

"The taxes assessed upon personal property shall be a lien upon all the *real and personal property* of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property."

Section 9223 (P. C. 501 § 181), provides that, if personal property taxes are not paid within the time therein provided, after the requisite notice has been given, the county treasurer "shall distrain sufficient goods and chattels *belonging to the person charged* with such taxes, if found within the county, to pay the same," together with costs and interest.

The first section extends the lien to all real and personal property owned by the person assessed at the date of the assessment. Whether it expands or extends the lien to personal property not assessed, but acquired subsequent to the assessment, is not presented by the bill. The two sections, when read together, make it clear that taxes upon personal property are treated as the debt of the person assessed. Section 9223 empowers the county treasurer to distrain any of the goods and chattels belonging to the person "charged" with the taxes, sufficient in quantity to pay the same. In making the distraint, the treasurer is not limited to the property assessed, but may distrain any personal property belonging

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to the tax debtor within the county, sufficient in amount to meet the taxes, together with costs and interest.

The complaint further alleges that, during all the year 1911, the respondent, a married man, with his family, resided at North Yakima, in Yakima county; that he and his family had no other residence or domicile during that year; that, during that year, he had leased, in Benton county, this state, certain farm and grazing lands, to the extent of 20,000 acres, which he occupied and used during all of that year as a stock farm; that he ran thereon and in connection therewith a band of 2,300 head of ewes; that the sheep were there fed, lambled, and sheared; that the farm was devoted exclusively to raising and caring for the sheep; that they were kept upon said lands during all the year 1911, except during the summer when they were ranged in the high mountains for about 120 days; that the farm was the headquarters for the sheep and packing outfits used in connection therewith; and that the sheep were not connected with any other farm. It is further alleged that, during the year 1911, the assessor of Benton county duly assessed the sheep; that the tax so assessed was \$142.08, which the respondent paid to the county treasurer of Benton county; that, during the same year, the assessor of Yakima county assessed the sheep in Yakima county; that thereafter a tax was levied against the sheep in that county for 1911, amounting to \$168.02, and that the respondent did not know of the assessment or levy of the tax until after the tax had become delinquent. The complaint further shows that the officers of Yakima county distrained 100 sheep in that county, belonging to the respondent, and that they were proceeding to sell them to satisfy the 1911 assessment made in Yakima county upon the sheep which were running and assessed in Benton county.

The applicable provisions of our statute are Rem. & Bal. Code, §§ 9121, 9125 (P. C. 501 § 53; 501 § 61). The former section provides that personal property, "except such as is required in this chapter to be listed and assessed otherwise,

shall be listed and assessed in the county where the owner or agent resides." The latter section provides:

"When the owner of livestock or other personal property connected with a farm does not reside thereon, the property shall be listed and assessed in the county or place where the farm is situated; if not listed in such county, then to be taxed where found."

The respondent did not reside on the Benton county farm in 1911. The question to be determined is, What did the legislature mean by "farm?" Clearly it was used in a generic rather than a restricted sense. The meaning to be ascribed to this word is that, where livestock has a home at a farm and the owner does not reside there, it shall be assessed in its home county. Where a tract of land, whether large or small, lying wholly within a single county, is used as a unit for the breeding, rearing, and feeding of stock, and the stock are there kept during the larger part of the year, as these sheep were kept in Benton county, the tract is a farm and the stock is "connected with a farm" within the meaning of the statute. A tract of land devoted to the breeding, grazing, shearing, and lambing of sheep is a farm, as much as a tract that is devoted to the growing of grain or to diversified farming. In short, a tract may be a farm without the aid of a plow. In common parlance, the words farm and ranch are used interchangeably. In Webster's New International Dictionary, a farm is defined as a "plot or tract of land devoted to the raising of domestic or other animals; as, a chicken farm; a fox farm." In *People ex rel. Rodgers v. Caldwell*, 142 Ill. 434, 32 N. E. 691, the word farm in a like statute is defined as "a body of land usually under one ownership devoted to agriculture, either to raising of crops or pasturage, or both." See, also, *Murdock v. Murdock*, 38 Utah 373, 113 Pac. 330; *Morse v. Stanley County*, 26 S. D. 313, 128 N. W. 153; *People ex rel. Tyler v. Scheisley*, 252 Ill. 486, 96 N. E. 890. The obvious intention of the law makers was that livestock should be taxed at the home of the stock, thus recognizing the equity of the home county to have the tax.

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The appellant cites *In re Drake*, 114 Fed. 229, and *Commonwealth v. Carmalt*, 2 Binn. (Pa.) 235. In the *Drake* case, the question before the court was whether Drake was a person "engaged chiefly in farming," within the meaning of the exemption clause in the bankruptcy statute. The court defined a farm as "a tract devoted to cultivation under a single control, whether it be large or small, isolated, or made up of many parcels." In the *Carmalt* case, the court said:

"By a farm we mean an indefinite quantity of land, some of which is cultivated. Most farms contain parcels of land applied to different purposes. Some are used for the cultivation of grass, some of grain, and some remain in wood."

These definitions, we apprehend, were intended to be illustrative rather than comprehensive. The word farm, when construed with reference to its context in our statute and so as to effectuate the manifest intention of the law makers, must be held to embrace a farm devoted exclusively to the breeding of stock. This view makes it unnecessary, and in the opinion of the majority of the court, improper, to consider the other questions suggested.

The judgment is affirmed.

CROW, C. J., CHADWICK, ELLIS, and MAIN, JJ., concur.

[No. 11301. Department One. January 7, 1914.]

EDWARD H. CHAVELLE, *Plaintiff*, v. ISLAND GUN CLUB *et al.*,
Respondents, G. H. BACON *et al.*, *Defendants*, EVERETT
CONSTRUCTION COMPANY, *Appellant*.¹

MECHANICS' LIENS—PERSONS ENTITLED—"CONTRACTORS"—SUBCONTRACTORS—STATUTES—CONSTRUCTION. A subcontractor, a dredging company, furnishing a dredger and doing dredging work upon a dyke at so much per day, under an oral contract with the principal contractor, is entitled to a lien for the amount of his contract price, under Rem. & Bal. Code, § 1129, according a lien to every person performing labor or furnishing materials for certain structures (including dykes), and Id., § 1139, providing that the "contractor" shall be entitled to recover only the amount due on his contract, after deducting all other claims for labor performed or materials furnished, and Id., § 1141, classifying lien claimants, and fixing their rank or order of payment, as follows: (1) laborers, (2) materialmen, (3) subcontractors, and (4) contractors; since it was the intention to provide a lien for every person furnishing material going directly into the structure or performing labor upon it, and "contractor" is used in its generic sense and includes subcontractors as well as the principal contractors.

SAME—SUBCONTRACTORS—CONTRACTS—PAYMENT BY DAY. The fact that a subcontractor is to be paid by the day does not affect his right to a lien for the amount due according to the terms of his contract.

SAME—NOTICE OF LIEN—SUBCONTRACTORS. Under Rem. & Bal. Code, § 1147, requiring the lien laws to be liberally construed, a subcontractor's notice of lien is not void by reason of failing to designate him as a subcontractor, *eo nomine*, where the facts alleged showed his relation.

SAME—SUBCONTRACTORS—AMOUNT OF CLAIM. A subcontractor's lien for the amount due under the terms of his contract cannot be sustained for a sum in excess of the amount of the principal contract price.

SAME—PROPERTY LIENABLE—SEPARATE INTERESTS. Where several parties were interested in the real estate, which was under contract of sale, only the interests of the purchasers are subject to a mechanics' lien for work done under a contract made by the purchasers.

¹Reported in 137 Pac. 511.

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SAME—NOTICE—SUFFICIENCY. A lien notice designating a gun club as the owner, is not fatally defective, where it was alleged that it was a voluntary association consisting of several persons who were named.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 13, 1912, upon sustaining a demurrer to the cross-complaint, dismissing an action to enforce liens for the construction of a dyke. Reversed.

Coleman, Fogarty & Anderson, for appellant.

E. H. Kohlhasse, for respondents.

ELLIS, J.—This action was instituted by one L. C. Hall, for the purpose of foreclosing a lien upon certain premises in Skagit county, owned by the defendants Bacon. The Island Gun Club, Suess and wife, Campbell and wife, and Stormfeltz and wife, were made defendants as holders of a contract for the purchase of the premises from the Bacons. The Everett Construction Company, a corporation, was made a defendant because of its having previously filed a notice of claim of lien against the same premises. It filed an answer and cross-complaint, to which a demurrer was sustained. In the meantime, Hall had been adjudged a bankrupt, and Edward H. Chavelle, as trustee in bankruptcy, was substituted as plaintiff. From an order dismissing its cross-complaint, the defendant Everett Construction Company appeals.

The facts admitted by the demurrer to the cross-complaint are as follows: On May 9, 1910, Hall, under a written contract with the defendants Suess, Campbell, and Stormfeltz, and the Island Gun Club, entered upon the work of constructing a dyke around the property in question. The Island Gun Club is an unincorporated association, composed of the defendants Suess, Campbell, and Stormfeltz. In carrying out his contract, the principal contractor, Hall, entered into an oral agreement with the appellant, Everett Construction Com-

pany, whereby that company was to do the work of dredging, furnish its own dredger and operating crew, and supervise the building of the dyke, for the sum of \$40 a day of nine working hours. Hall completed the dyke, performing work alleged to be of the value of \$8,016.87, of which he received \$4,750, leaving a balance unpaid of \$3,266.87. The appellant, under its oral agreement with Hall, furnished the dredger and crew for a period of time sufficient to entitle it to \$2,478.46, of which \$400 has been paid, leaving a balance owing to it of \$2,078.46, with interest. On October 24, 1910, it filed its notice of lien against the premises; and on November 9, 1910, Hall filed his notice of lien. Subsequently, the present action was begun in the lower court, with the result above noted. The sole question presented for our consideration is whether or not the oral agreement entered into between Hall and the appellant here and the work performed thereunder was such as to entitle the appellant to a lien on the premises.

The statute under which the appellant claims the right of lien contains the following provisions material to this inquiry (references are to the section numbers of Rem. & Bal. Code):

"Sec. 1129: Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any . . . dyke . . . has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor . . . or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter."

"Sec. 1139: The contractor shall be entitled to recover upon the claim filed by him only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for labor performed and materials furnished . . ."

"Sec. 1141: In every case in which different liens are claimed against the same property, the court, in the judgment,

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must declare the rank of such lien or class of liens, which shall be in the following order:

- "1. All persons performing labor;
- "2. All persons furnishing material;
- "3. The subcontractors;
- "4. The original contractor."

"Sec. 1147: The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects." (P. C. 309 §§ 53, 73, 77, 89).

A reading of these sections, and an application of the liberal rule of construction prescribed by the section last quoted, induces the view that it was the intention of the law makers to provide a lien for every person furnishing materials going directly into the given structure, or performing labor directly upon it. The provision first quoted (§ 1129) accords a lien to every person performing labor or furnishing materials, and § 1141 classifies all persons doing either, and prescribes the rank of their liens. Section 1139, taken in connection with § 1141, must be construed as using the word "contractor" in its generic sense, and including both the principal contractor and subcontractors, else there would be no lien for a subcontractor as such, and no lien whatever for a subcontractor except as he might also be a laborer or a materialman. The latter cannot be the intention, because, in § 1141, the subcontractor's lien is subordinated to that of laborers and materialmen, which would be wholly senseless unless there were a distinction between the lien of a subcontractor and that of a laborer or materialman.

Construing these three sections together and giving a meaning to each, it is clear that a subcontractor as such is entitled to a lien for labor or materials or both, furnished and paid for by him in the performance of some specific part of the work under contract with the principal contractor, as distinguished from the lien prescribed for laborers and materialmen as such. The recovery on a subcontractor's lien is,

therefore, like that of any other contractor given under § 1139 "according to his contract;" otherwise it has no independent existence, though expressly subordinated to, and hence distinguished from, the liens of laborers and materialmen under § 1141. It follows that the only sensible distinction between the lien accorded to the principal contractor and the subcontractor is found in the fact that, in marshaling liens, the latter ranks the former and receives a preference in the distribution of the proceeds of the sale of property subject to the liens on foreclosure, just as the latter is subordinated to the liens of laborers and materialmen as such.

There is, and can be, no distinction as to the character of the items going to make up the lien claim of the principal contractor and that of a subcontractor without destroying the lien of the latter as a distinct lien. Each is entitled to recover upon his lien claim the amount due according to his contract, "after deducting all claims of other parties for labor performed or materials furnished." Unquestionably, the principal contractor who undertakes a given work and contracts to furnish labor, materials, tools and instrumentalities for the purpose, is entitled to a lien for all labor performed and materials furnished and paid for by him in the performance of his contract; and the amount of his lien is determined by the amount due him according to the terms of his contract and neither this amount nor the lienability of his claim is affected by the fact that he also agrees to furnish, as part of the consideration for his contract on the given terms, the instrumentalities and tools used in the work and by which the labor is made effective and the materials handled, molded, fitted and adjusted to the work. In this regard, there can be, as we have seen, no distinction between the principal contractor and a subcontractor without destroying the subcontractor's lien. This construction is the only one which accords a meaning and gives an effect to every part of the statute. As said in *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, at page 341:

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"The other sections of the statute which we have cited clearly indicate that a subcontractor or contractor is to be regarded as performing labor upon the building, and is entitled to file lien claims therefor the same as laborers and materialmen, but subordinate to such liens. Construing the act, as we must, so as to give effect to every part thereof, we must hold that the contractor has a lien for the contract price, irrespective of the fact that he performed no service further than overseeing the construction of the building according to his contract."

Under the statute so analyzed and construed, we think it plain that the appellant here was a subcontractor and, as such, was employed under contract with the principal contractor to furnish the labor and the appliances necessary to make that labor effective in doing the dredging, and to supervise the work. It follows that it was entitled to a lien for the contract price, namely, \$40 for each day of nine hours, after deducting all claims of other parties for labor performed or materials furnished (§ 1139) and that its lien should rank third (§ 1141) in participating in the proceeds of the sale of the property, subject to all liens of laborers and materialmen employed in constructing the dyke.

The mere fact that the compensation was computed by the day cannot have the effect of changing the appellant's status as a subcontractor. Under the facts as pleaded and set up in the lien, it contracted to perform a specific part of the work, namely, the dredging. The mode of computing the payment on the contract cannot reasonably be held to affect the character of the contract. While the complaint and lien notice do not designate the appellant as a subcontractor *eo nomine*, they do set up the facts which make the appellant a subcontractor and entitle him to a lien as such. This, under the liberal rule of construction required by § 1147 above quoted, must be held sufficient.

It may be objected that, if the contract amount be held to fix the amount of the subcontractor's lien, as in the case of the principal contractor, there might be danger that, by

collusion with the principal contractor, a subcontract or a number of subcontracts could be let for an amount in excess of the contract price for which the principal contractor had agreed to perform the work, and the owner's property thus charged with an amount in excess of what he contracted to pay. Such a danger is more apparent than real, since such subcontracts would be fraudulent on their face, and if such a situation should develop, it would present such conclusive evidence of fraud as to defeat all of the liens. No court would sustain subcontract liens in excess of the principal contract price.

Our construction of the statute is inferentially sustained by the decision in *Smyth v. Lance & Peters*, 52 Wash. 560, 100 Pac. 995. While in that case the opinion refers to the lien as a laborer's lien, the facts set out clearly show that Smyth, the lien claimant, was a subcontractor. He took a contract to perform a distinct and divisible part of the work of constructing a building, namely, to do the plastering. He agreed to furnish the men and presumably the tools also, and do the work, and was to receive as pay therefor the amount he paid his men, plus \$7 a day for himself and 10 per cent of the amount he paid the men. He was allowed a lien not only for his own compensation, but for the money which he had paid to the men who assisted him in the work. His recovery was according to his contract.

The cases relied upon by respondents: *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670, and *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912 B. 225, are not apposite. In the first case, the lien claimant furnished no materials and performed no labor. He merely rented scrapers to the original contractor as tools for doing the work. He was neither a laborer, a materialman, nor a subcontractor, within the terms of the statute. In the second case, *Gilbert Hunt Co. v. Parry*, the same situation was presented. Practically every item in the lien claim was for tools and appliances and supplies for running machinery. The things furnished

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were not materials going into the work, hence did not fall within the terms of the statute.

According to the allegations of the complaint and the appellant's answer and cross-complaint, the Bacons were not parties to the contract with Hall to construct the dyke, hence only such interest in the land as the Island Gun Club, Suess and wife, Campbell and wife, and Stormfeltz and wife had under their contract of purchase from the Bacons can be subjected to the appellant's lien. The claim that the lien notice was fatally defective in that it designated only the Island Gun Club as a party and not Suess, Campbell and Stormfeltz, individually, is without merit, since it is alleged that the Island Gun Club is a voluntary association composed of these persons. Doubtless, if the decision of the trial court had been based upon that ground, an amendment would have been made to include the parties interested by name. We take it, however, from the argument and from the record, that the trial court held the lien invalid because of the fact that the appellant, by its contract, was obligated to furnish not only the labor, and superintend the work, but also the instrumentality, namely, the dredger by which that labor was made effective. In this, as we have seen, the trial court was in error.

The judgment is reversed, and the cause is remanded for reinstatement and further proceedings in accordance with the views here expressed.

CROW, C. J., MAIN, GOSE, and CHADWICK, JJ., concur.

[No. 11402. Department Two. January 8, 1914.]

MATILDA RYDSTROM, *Respondent*, v. H. M. RYDSTROM,
Appellant.¹

APPEAL—REVIEW—FINDINGS. Findings in a divorce case, granting a decree and making a division of the property will not be disturbed on appeal when justified by the evidence.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered January 16, 1913, upon findings in favor of the plaintiff, in an action for a divorce. Affirmed.

John I. O'Phelan, for appellant.

Fred M. Bond, for respondent.

MOUNT, J.—Action for divorce.

In her complaint, the plaintiff alleged several grounds for divorce, one of which was cruelty. Upon the trial of the case, the court found, "that the treatment of the plaintiff by defendant during the past two years has been practically inhuman, and amounting to cruelty . . . until it is absolutely impossible for the parties to live together any longer." Upon this ground, a divorce was granted to the plaintiff, and the property of the parties was divided between them. The defendant has appealed.

The appellant assigns several errors, but the principal contentions are that the evidence is insufficient to support a decree upon the ground of cruelty, and that there was an unequal and unjust division of the property.

Both of these positions depend entirely upon the facts in the case. We have carefully examined the evidence, and have concluded that the superior court was justified in granting a decree of divorce upon the ground stated. We are also of the opinion that the division of the property made by the court was substantially equal. But whether it was equal or

¹Reported in 137 Pac. 1198.

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not, we are of the opinion that the respondent is entitled to the share of the property which was awarded to her. It is unnecessary to discuss the facts or the evidence of the witnesses upon which the findings of the court were based, because such a discussion would serve no useful purpose in its publication.

The judgment appealed from is affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11409. Department One. January 8, 1914.]

ELIZABETH MINNIE VIERECK, *Appellant*, v. C. J. SULLIVAN
et al., *Respondents*.¹

PARENT AND CHILD—CUSTODY—WELFARE OF CHILDREN. Where a divorced parent seeks to recover custody of children from persons holding under adoption proceedings, the dominant question is the moral, intellectual and material welfare of the children, and the wishes of the parent are subordinated thereto.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 21, 1913, in favor of the defendants, quashing a writ of habeas corpus, after a hearing on the merits. Affirmed.

James R. Chambers, for appellant.

James Kiefer and Hastings & Stedman, for respondents.

PER CURIAM.—On the 23d day of June, 1906, one Joseph W. Spangler, by an instrument in writing, relinquished his right and claim to the custody and services of his two minor daughters, then of the ages of six years and five years respectively, to the Washington Children's Home Society, a domestic corporation, and authorized it to secure their legal adoption. A short time thereafter, upon petition and with the consent of the society, orders were entered in the superior

¹Reported in 137 Pac. 456.

court of King county, whereby the respondents Sullivan adopted one of said children and the respondents Nichols adopted the other. In January, 1908, in a decree of divorce entered in the superior court of Whatcom county upon personal service, wherein Joseph W. Spangler was the plaintiff and the appellant was the defendant, the court approved and confirmed the relinquishment of the children theretofore made by the father. The respondents respectively have had the exclusive custody and control of the children since the summer of 1906. In April, 1913, the plaintiff, the natural mother of the children, sued out a writ of habeas corpus for the purpose of having the custody of the two girls, then of the ages of thirteen and twelve years respectively, restored to her. After a full hearing, the court, among other things, determined that the welfare of the children required that they be left with their foster parents, and quashed the writ. The plaintiff has appealed.

The appellant assails, (1) the validity of the adoption proceedings; (2) that part of the decree in the divorce case confirming the surrender made by the father; and (3) the several findings of the court. As we view the case, the first two questions need not be considered.

The appellant and Joseph W. Spangler, the mother and father of the children, separated in April, 1906. In January, 1908, they were divorced at his suit. In June, 1906, he, by an instrument in writing, surrendered the children to the Children's Home Society. Shortly thereafter, they were placed, and have since remained, in the custody of the respondents, in obedience to the adoption proceedings. So far as the record discloses, the appellant has not seen the children since June, 1906.

In this, as in all other cases of the kind, the dominant question is the moral, intellectual, and material welfare of the children. The wishes of the parent are subordinated to these considerations which, by all the courts, are deemed paramount. *State ex rel. Collier v. Bell*, 58 Wash. 575, 109 Pac.

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51; *In re Fields*, 56 Wash. 259, 105 Pac. 466; *Pierce v. Pierce*, 52 Wash. 679, 101 Pac. 358.

The character of the evidence is such that a discussion of it would serve no useful purpose. It suffices to say that, after reading it carefully, we are convinced that the judgment entered is promotive of the welfare of the children. The judgment is therefore affirmed.

[No. 11466. Department Two. January 8, 1914.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v.
PIERCE COUNTY *et al.*, *Respondents*.¹

TAXATION—VALUATION—RAILROAD RIGHT OF WAY—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY. An assessment of a strip of land 100 feet wide and 21 miles long, acquired by a railroad company for a right of way, at an assessed valuation of \$1,000 per acre within city limits, and \$500 per acre outside the city, aggregating \$137,980, is so excessive as to be constructively fraudulent, where it appears that the strip was without improvements and undistinguishable from adjacent lands, which in the city were valued at from \$40 to \$300 per acre, and outside the city, at from \$5 to \$165 per acre, which was the fair value; even if single ownership of the continuous strip enhanced its value; especially where the previous year the valuation was only one-fourth as much, and the state tax commission had placed a uniform valuation on rights of way similarly situated of \$1,320 per mile; that a proper assessment would be \$45,993; and no greater valuation should be permitted.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered July 1, 1913, dismissing an action to recover a tax paid under protest, after a trial on the merits to the court. Reversed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

Lorenzo Dow and W. W. Keyes, for respondents.

¹Reported in 137 Pac. 433.

FULLERTON, J.—In the years 1911 and 1912, the appellant, Northern Pacific Railway Company, owned a tract of land, approximately 100 feet in width and 21 miles in length, extending from a certain point in the city of Tacoma, called in the record the west portal of the Point Defiance tunnel, southerly, following near the shores of Puget Sound, to the boundary line between the counties of Pierce and Thurston. The land was procured by the railway company for railway purposes; it being intended for use as a part of its right of way for the relocation of its railroad between the city of Tacoma, in Pierce county, and the town of Tenino, in Thurston county, which the company contemplated making. The land lies wholly within the county of Pierce and, for approximately one-third of the way, within the boundary lines of the city of Tacoma. For the purposes of taxation for the year 1912, the assessor and board of equalization of the county of Pierce valued the land lying within the boundaries of the city of Tacoma at an average of \$1,000 per acre, and that lying without such limits, at an average of \$500 per acre. The land at that time contained no improvements whatever, but lay in a state of nature, and was undistinguishable from the abutting and adjacent lands, save only as it may have been marked off by stakes driven to mark its general course. On the assessment roll, the land was described as parts of the several tracts from which it was originally taken, and separately assessed as such, although, as we say, at a uniform rate per acre. The assessed valuation aggregated \$137,980, on which a levy was made of \$3,272.58.

The appellant railway company conceived that the property had been grossly overvalued, and, estimating that its actual value was not to exceed \$31,360, and that a proper levy thereon would not exceed \$737.21, tendered this sum in lieu of the assessment actually levied. The taxing officers refused to receive the amount tendered in satisfaction of the levy, whereupon the railway company paid the entire sum under protest, and thereupon instituted the present action to re-

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cover back from the county the difference between the amount of the tax it concedes to be due and the amount actually paid. The lower court, after a trial, dismissed the action. This appeal followed.

If we are to consider the land in question as merely a part and parcel of the general territory of which it forms a part, the evidence discloses that it is palpably and grossly overvalued by the assessor. It was shown that, whereas, the lands of the appellant in the city limits of the city of Tacoma were valued at the rate of \$1,000 per acre, the abutting and adjoining lands, in many instances and tracts from which the right of way was taken, were assessed at from \$40 to \$300 per acre, the average valuation being less than \$150 per acre; that, outside of the city limits, while the right of way was assessed at an average valuation of \$500, the adjoining and abutting lands were assessed at from \$5 to \$165 per acre, the average valuation being less than \$40 per acre. Since it was shown that these adjoining and abutting lands were assessed at their fair value, it requires no argument to demonstrate that, if these several tracts of land forming this right of way were still in the hands of the owners from whom the appellant purchased them, they are grossly overvalued, so much so, indeed, as to require relief.

Is the land of greater value than the adjoining and abutting lands because of its single ownership, or peculiar situation? The respondent argues that it is. It does not claim, of course, that the land has any peculiar or any greater value than the surrounding lands because it is owned by a railroad company, or because it will be used for railroad purposes; but it contends that it occupies the water front of Puget Sound for the greater part of the way, and is the only feasible and practicable means of approach, with proper grades and curves, for a railroad into the city of Tacoma from the south, and as such has a special and peculiar value not possessed by the adjoining and abutting lands. It contends further, also, that there is no evidence in the record that the

land when considered with reference to these particular features, is grossly or excessively overvalued.

But it seems to us that these contentions are not wholly justified by the record. The strip of land in question, it is true, follows the general contour of the shores of Puget Sound for its greater distance, but the plats introduced in evidence show that it is taken, for the greater part, from the uplands. The tracts left between the strip and the shore line are, in many instances, narrow, but they are of sufficient width for use, and no monopoly of the shore lands was acquired by the acquisition of the right of way. In this connection, it may be noticed, also, that the valuations placed upon the shore or tide lands by the assessor which were not taken by the railway company did not, in any instance to which our attention has been called, exceed one-third of the value placed on the lands of the railway company. As to this being the only feasible and practicable pass for a railway into Tacoma from the south, the only witness who was seemingly competent to give evidence on the question, a civil engineer, testified that another railroad could be built paralleling one built upon this tract of land at practically the same cost. Moreover, if the contention of the respondent that this was the only feasible route for a railway were true, the railway company first acquiring it could have no monopoly of its use. Under the act of the legislature of this state known as the Defile Act, any other railway company finding it necessary to build over the same route can compel the present owners to surrender to it a part of the right of way at all places where the necessities of the case required it. *Laws 1890, p. 301; Rem. & Bal. Code, § 933 (P. C. 171 § 180c). North Coast R. v. Northern Pac. R. Co., 48 Wash. 529, 94 Pac. 112.*

Since, therefore, the tract, at the time the valuation was made, was in a state of nature, unimproved in any particular, and undistinguishable from the adjoining and surrounding lands to the ordinary observer, its only claim to an enhanced

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value is that it formed a continuous strip in the hands of a single owner. But conceding that this gives it a value in excess of the surrounding lands the title to which is in the hands of a number of owners, we cannot think the added value anywhere near equals the added value the assessor chose to put upon it. Indeed, it appears to us that discrepancy is so gross as to amount to constructive fraud. Its actual assessable value is, however, not easily determinable from the record, but we think there was evidence from which a proper value could be ascertained. In addition to showing the excess of valuation over the abutting and surrounding lands, it was shown that the state tax commission, on lands coming within their jurisdiction situated similarly to these lands, that is to say, "All railroad grades, and rights of way, upon which the ties have not been laid," had placed a uniform valuation of \$1,320 per mile, or 25 cents per lineal foot, and that the assessor of Thurston county had placed a value on this same right of way where it extended into Thurston county at this rate. It was shown, also, that the assessor of Pierce county for the year preceding the year of this assessment had placed a value thereon of about one-fourth of the present valuation, and that lands generally in this vicinity had rather decreased than increased in value during the interim. Taking these figures as a basis, we are satisfied that no assessment in excess of \$45,993.34 should be permitted to stand.

The judgment of the court below is therefore reversed, with directions to allow a recovery of the taxes paid in excess of a tax based on an assessed valuation of \$45,993.34.

CROW, C. J., MOUNT, MORRIS, and PARKER, JJ., concur.

[No. 11332. Department Two. January 8, 1914.]

MABEL LE VETTE, *Appellant*, v. HARDMAN ESTATE *et al.*,
Respondents.¹

LANDLORD AND TENANT—LEASE—CONDITIONS—EXEMPTION OF DAMAGES—NEGLIGENCE OF LESSOR—LIABILITY. A provision in a lease of a storeroom that the lessee shall hold the lessor harmless from all damages by reason of accidents on the premises or the bursting of pipes, above, upon, or about the building or any damage occasioned by water, or the acts or neglect of cotenants, only includes the damages expressly waived, and does not excuse an injury occasioned by the negligence of the landlord.

SAME—DEFECTIVE PREMISES—DAMAGES TO TENANT—NEGLIGENCE OF LANDLORD—EVIDENCE—QUESTION FOR JURY. The negligence of the lessor of a storeroom on the ground floor of a hotel building, in failing to control and keep the upper stories in a condition of reasonable safety, is for the jury, where it appears that the upper tenant moved out, and the upper part of the building was broken into several times and a washstand torn out, leaving a water pipe broken, the water having been turned off; and, upon renting a vacant house in the rear connected with the same water service pipe, the lessor had the water turned on without making an investigation of the upper stories, whereby the water escaped and damaged the lessee's goods in the storeroom.

PRINCIPAL AND AGENT—LIABILITY OF AGENT. A tenant who dealt with a known owner and sought to hold the owner liable for injury to goods, cannot hold the owner's rental agent.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 13, 1912, dismissing an action by a tenant for injury to goods, on granting a nonsuit. Affirmed as to one defendant; reversed as to the other.

McCafferty, Robinson & Godfrey, for appellant.

Reed & Hardman, for respondent Hardman Estate.

Robert F. Booth, for respondent John Davis & Company.

MORRIS, J.—Appeal from an order of nonsuit and dismissal, in an action brought by a tenant to recover damages for injuries to her goods, caused by leakage of water from an

¹Reported in 137 Pac. 454.

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upper story. The facts, so far as they are pertinent to our inquiry, are about these: The Hardman Estate is the owner of a building on Yesler Way, in Seattle, the lower portion of which is divided into storerooms, and the upper is used as a hotel. Appellant, who was engaged in the millinery business, occupied one of the storerooms under a written lease. Some time in August, 1911, the lessee of the hotel portion, although his lease had not expired, vacated the upper stories, and they continued vacant until after the damage complained of. This lessee not having paid his water rent, the city turned off the water from the hotel portion of the building some time in September. This water service so turned off, it appears, did not affect the storeroom occupied by appellant. There was, however, a dwelling on the rear of the lot which was supplied with the same service pipe as the hotel, and which had been vacated for some time. This vacant dwelling in the rear was rented on November 15, and orders given the city to turn on the water, which was done on November 16. Soon after the water was turned on, it began to flow through the ceiling and into the room occupied by appellant, causing the damage complained of. An examination of the premises disclosed the fact that, in one of the rooms over the storeroom occupied by appellant, a washstand had been torn from the wall and the water pipes broken, making quite a hole through which the water was escaping. It was also discovered that a large rear window opening on the alley had been broken, making an opening large enough for a person to enter the building. It was also shown that, on three other occasions during the vacancy of the hotel portion, the windows on the alley had been broken, supposedly by boys getting into the building. The lease contained the following clause:

"That the said lessee shall hold harmless the said lessor and the said lessor's agents from all damages of every kind or nature whatsoever that may occur by reason of any accident on said premises, and from any damage done or occasioned by

or from plumbing, gas, water, steam, or other pipes or sewerage; or the bursting, leaking or running of any cistern, tank, wash-stand, or waste-pipe in, above, upon or about said building or premises; and from any damage occasioned by water, snow, or ice being upon or coming through the roof, skylight, wall, trapdoor, or otherwise, and from damages arising from acts of neglect of co-tenants or other occupants of the same building, or of any owners or occupants of the adjacent or contiguous property."

This stipulation, in the judgment of the lower court, exempted the respondents from any responsibility in the matter, and was the basis of the ruling complained of. Stipulations of this character cannot be enlarged upon to include any damage not expressly waived, and it is generally held that such a stipulation will not excuse an injury occasioned by the negligence of the landlord in the management and use of any part of the premises remaining under his control. *Levin v. Habicht*, 45 Misc. 381, 90 N. Y. Supp. 349; 1 Thompson, Negligence, § 1143. It has also been held that such stipulations cover only ordinary wear and tear, or sudden action of the elements which could not be guarded against, or negligent acts of other tenants. *Randolph v. Feist*, 23 Misc. 650, 52 N. Y. Supp. 109; *Worthington v. Parker*, 11 Daly (N. Y.) 545.

It is clear from the facts that the damage to appellant was not caused by any breaking of water pipes on the premises leased to her, nor was it due to any negligence of cotenants, nor of owners or occupants of adjacent property, but was due to the bursting or breaking of water pipes on premises not covered by the lease but within the building, and fall within that clause of the waiver exempting damage occasioned by bursting or leaking of washstands in, above, upon, or about the building, or by water coming through the walls. We think it is also clear that the cause of the damage was not an ordinary leak due to defective plumbing or usual wear, such as might be anticipated in any building and thus be within the contemplation of the parties when entering into a

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stipulation of this character, but was an unusual and unexpected happening, due to other than natural and anticipated defects or lack of repair in any fixture forming part of the water system of the building.

There was no evidence that the proximate cause of this damage was any act of the landlord; and if appellant's cause must rest upon some positive act of the landlord, it must fail. Negligence, however, may be predicated upon the failure to act where the law imposes a duty; and as between the appellant and the landlord, the occupancy and possession of the upper stories, with all the duties flowing from such a relation, were with the landlord. The landlord could not excuse itself from this duty to appellant because of the fact that, as between it and the lessee of the upper stories, the possession and occupancy was that of the latter. And this, we think, is so notwithstanding the tenant of the upper story had vacated within the term covered by the lease and the legal right of possession still remained in him. This might be and doubtless was true, as between the landlord and the upper tenant; and as between them, the upper tenant was still bound under his lease. But, whatever may have been the legal fiction, the facts were the upper tenant had vacated the premises and thus occasioned an actual, if not a legal, vacancy. Possession and control must rest somewhere, and as between the landlord and appellant, who was no party to the lease held by the upper tenant and not bound by any contract between this tenant and the landlord, this possession and control was, we think, with the landlord. It, therefore, seems to us, conceding the rule to be that the landlord is under no legal obligation to repair the demised premises, that it was the duty of the landlord to so control and preserve the upper stories as to keep them in a condition of reasonable safety, in so far as such a condition affected the tenant of the lower story; that, if it negligently suffered the upper story to be out of repair to such an extent as to damage the tenant of

the lower story, it must respond in damages, and that the ordinary rule we have just referred to does not cover such condition as the facts here present. *Priest v. Nichols*, 116 Mass. 401.

So far as we can gather from the facts, the injury was caused by evilly disposed persons breaking into the building through the windows in the alley and outside of the premises covered by the lease to appellant. But the duty to guard the premises, so that such persons could not break into the building and injure the fixtures in the upper story, rested with the landlord and not with the appellant; and as it also appeared that these rear windows had been broken on three previous occasions, thus affording entrance to the upper stories, the landlord is chargeable with knowledge of the fact, and having knowledge it was its duty to guard against any recurrence and the natural consequences of such a trespass, by either protecting the premises from such a breaking, or investigating as to any harm that might have been occasioned thereby. The landlord also knew that the hotel section and the house in the rear were connected with the same water service pipe, and before the water was turned on, should have made an investigation of the upper floors to ascertain whether or not such an act could be done with safety to the premises occupied by appellant. Such failure to properly exercise superintendence over the upper story might, it seems to us, within the facts of this case, be held negligence. *Rosenfield v. Newman*, 59 Minn. 156, 60 N. W. 1085. At least, we are not so clear it was not negligence as to say the question should not have been submitted to the jury. This disposes of the dismissal as to *The Hardman Estate*.

John Davis & Company was only the rental agent of the owner. Appellant, having dealt with a known owner and having sought to enforce her cause of action against the principal, cannot hold the agent, and as to this respondent the dismissal is sustained.

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Statement of Case.

The judgment is affirmed as to John Davis & Company, and reversed as to The Hardman Estate.

CROW, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 11448. Department Two. January 8, 1914.]

J. H. MILLER *et al.*, *Appellants*, v. GEORGIETTA MOULTON
et al., *Respondents*.¹

ASSIGNMENTS—CONTRACTS—PAYMENTS OR SECURITY—CONSTRUCTION. An assignment of a contract for the purchase of land valued at \$7,500, "as part consideration" and "as security for the performance" of the assignor's contract to purchase other lands from the assignee for \$10,000, was intended as security only, where the contract of purchase recited a consideration of but one dollar, and provided that the lands in the assigned contract might be sold for not less than \$7,500 and the proceeds applied on the purchase price.

VENDOR AND PURCHASER—RESCISSION BY VENDOR—FORFEITURE—SECURITY FOR FULL PERFORMANCE. Upon rescission by the vendor for default in the payment of interest due on a land contract, the vendor cannot retain a land contract assigned as security for full performance of the vendee's contract of purchase.

SAME—REMEDIES OF VENDOR—LIQUIDATED DAMAGES OR PENALTY—CONTRACT—CONSTRUCTION. An assignment of a land contract as part consideration and security for the performance of a contract to purchase land, cannot be retained as liquidated damages as provided in the contract of sale on declaring a forfeiture, where the vendee was required to do many things, such as keeping up the premises and orchard, paying taxes, etc.; since the stipulated sum was to be paid for the nonperformance of several acts of different degrees of importance, making it a penalty; and since the stipulations determining whether it was to be treated as a penalty or liquidated damages are uncertain and ambiguous.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered March 25, 1913, upon the pleadings, granting defendants relief prayed for in an action to declare a forfeiture. Affirmed.

¹Reported in 137 Pac. 491.

Reneau, Thomas & Hannan, for appellants.

John E. Porter and Reeves, Crollard & Reeves, for respondents.

MORRIS, J.—In July, 1910, J. H. Miller and Noyes Moulton, with their respective wives, entered into a contract for the sale and purchase of eighty acres of land, in Chelan county, for \$10,000, one dollar of which was paid on the day the contract bears date, and the balance was payable on or before three years, with semiannual interest on deferred payments at eight per cent. Time was made of the essence of the contract. It was provided that, in case of the vendee's default, they should forfeit all payments made under the contract. The Moultons were, on this date, the holders of a contract for the purchase of 160 acres of land in Douglas county, known in the record as the Underwood contract, and the contract for the Chelan county lands provided that the Moultons "as part of the consideration of this contract and as security for the performance of the same, hereby assign, sell and set over to said parties of the first part [appellants] that certain contract from Julia A. Underwood," etc.

Respondents made default in the fourth interest installment, and appellants, electing to forfeit the Chelan county contract, served notice of such forfeiture, and began this action to obtain a decree of forfeiture. Respondents answered, admitting the default in the payment of interest and receipt of the notice of forfeiture, and alleged the Underwood contract was pledged only as security for the performance of the Chelan county contract, and that appellants, having elected to forfeit the Chelan county contract, had rescinded the same, and thus lost their right and interest in the Underwood contract; and prayed for a decree returning the same to them. The cause coming on to be heard, both parties announced they had no evidence to offer, but relied for judgment on the admissions in the pleadings. The court, after hearing respective counsel, then entered its decree,

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granting to appellants full relief as to the Chelan county lands, but denying them any relief as to the Underwood contract, and decreed a return thereof to respondents. This appeal followed.

The land described in the Underwood contract was valued by the parties at \$7,500, and it was one of the stipulations in the Chelan county contract that the Moultons might at any time sell the land covered by the Underwood contract at not less than \$7,500, in which case the proceeds of such sale were to be applied as payment upon the Chelan county contract. It was also provided that, in case respondents should become entitled to a deed to the land described in the Underwood contract prior to the full performance of the Chelan county contract, such deed should issue to appellants. It is clear to us that it was the intent of both parties that the Underwood contract was turned over merely as security for the full performance of the Chelan county contract; for, had it been intended otherwise, we fail to see how appellants could obtain a default in the payment of interest upon \$9,999 as then being due upon the Chelan county contract. The Chelan county contract would, in this view, have also recited a receipt for more than the one dollar at the time of its execution; for whether \$7,500 was or was not the true value of the Underwood contract, it had some value, and had it been given and received as part payment, such value would have been expressed in the consideration paid at the time of entering into the Chelan county contract. It is also clear that, if, as provided in the Chelan county contract, the respondents had become entitled to a deed under the Underwood contract and said deed had issued to appellants as stipulated in such case, appellants would have been entitled to receive \$17,500 for the Chelan county land, instead of \$10,000, the price fixed. This provision alone is a clear indication that the parties regarded the Underwood contract as security only, since no provision is made for applying it in any way to the amount due upon the Chelan county land.

Appellants, having elected to rescind the Chelan county contract for a failure of part performance, cannot retain that which was given to them as security for full performance. Appellants cannot repudiate the contract and at the same time profit by insisting upon the performance of conditions which were not fully matured. Nor can they be permitted to retain the security for the performance of the contract while insisting upon its rescission; since by so doing they would demand an enforcement of all rights given them under the contract while denying any rights to the vendee. It is equally clear that, if the Underwood contract be not regarded as security, the stipulations from which it is to be determined whether it is to be treated as liquidated damages or a penalty are uncertain and ambiguous. Under the contract, the respondents are required to do many things, such as to keep up and care for the premises, to maintain the fruit orchard, pay all taxes and assessments that may be levied, both upon the Chelan and Douglas county lands, and pay interest semiannually; thus bringing the case within the rule announced in *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. 165, 84 L. R. A. (N. S.) 1, where it is said:

"If the principal agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and the stipulated sum is to be paid on the violation of any or all of them, and the sum will in some instances be too large, or if from an examination of the written agreement it is uncertain whether it was the intent of the parties that the stipulation was intended as liquidated damages, or as a penalty, it should be treated as a penalty."

Applying this rule, we must treat the Underwood contract as a penalty, and the same result would be reached as if we regarded it as security only.

For these reasons, the judgment is affirmed.

CROW, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

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[No. 11451. Department Two. January 8, 1914.]

LAURA F. HAY, *Appellant*, v. ESTHER C. BOGGS *et al.*,
Respondents.¹

FRAUDULENT CONVEYANCES—FRAUD OF WIFE—LIABILITY OF VENDEE—ISSUES AND PROOF. In an action by a divorced wife to set aside a fraudulent transfer by her husband in which it appears that the fraudulent vendee had disposed of part of the premises to an innocent purchaser, judgment should be given against the vendee for the value of the property sold; and it is immaterial that the pleadings made no issue as to such part, where the issues went to the whole tract, and it appeared for the first time at the trial that part had been sold.

EVIDENCE—VALUES. That land had been valued in a trade at a certain sum is not sufficient evidence of its value.

Appeal by plaintiff from a judgment of the superior court for Clarke county, McMaster, J., entered March 5, 1913, upon findings in favor of the plaintiff, granting only part of the relief prayed for, in an action for a divorce and to declare a trust. Reversed.

Charles R. Crouch, for appellant.

W. W. Sparks and Miller, Crass & Wilkinson, for respondents.

MORRIS, J.—Prior to September 2, 1911, appellant and Aaron Hay were husband and wife. On that day, a decree of divorce was granted appellant, in which all of the property, both real and personal, then owned or possessed by Aaron Hay, was awarded to appellant. So far as this record goes, the only property affected by this decree was forty acres of land in Clarke county, for which Aaron Hay had obtained a contract of purchase from the Northern Pacific Railway Company, on August 5, 1904, and while he and appellant were husband and wife. This tract was, on August

¹Reported in 137 Pac. 474.

24, 1907, assigned by Hay, representing himself as an unmarried man, to Esther C. Boggs, his aunt. On July 2, 1908, all payments having been made, the land was deeded by the railway company to Mrs. Boggs.

In 1912, appellant commenced this action, in which, alleging that the assignment and deed to Mrs. Boggs were fraudulent as to her and were for the use and benefit of Aaron Hay, she prayed that the land be conveyed to her, and her title quieted as against Aaron Hay and Mrs. Boggs. Aaron Hay defaulted, and Mrs. Boggs answered, denying the fraudulent character of the transfer, and alleging she was a purchaser for value. On the trial, it appeared for the first time that twenty-five acres of the land had been exchanged by Mrs. Boggs for eighteen lots at Klamath Falls, Oregon, the person with whom such exchange was made and who now holds title to the twenty-five acres, being, so far as is here shown, an innocent purchaser. The lower court, in deciding the issues, gave it as his opinion that the assignment and deed to Mrs. Boggs were collusive and in fraud of appellant's rights, and that she should be awarded the property, holding that Mrs. Boggs was a trustee for the Hays for the forty acres, and that appellant was entitled to a conveyance of the fifteen acres, and ordered the same to be made within thirty days; but made no reference to the twenty-five acres further than to find it had been sold by Mrs. Boggs. Appellant asked the lower court to award her a judgment against Mrs. Boggs for the sum of \$4,450, as the value of the twenty-five acres; which being refused, she appeals.

The lower court should have made and entered a decree affecting the entire forty acres; for it is manifest from the findings, which are supported by the evidence, that appellant obtained the same rights to the twenty-five acres as she did to the fifteen acres. The fact that the twenty-five acres was in the ownership of an innocent purchaser might have affected appellant's remedy so far as the land itself was concerned; but if the court believed it had been sold to an innocent pur-

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chaser, appellant should have been awarded its value. The record before us is not sufficient for us to make a finding as to the value of this twenty-five acres. The only reference to value is found in the testimony of the purchaser, who says he exchanged lands which he valued at \$4,450, and in the exchange the twenty-five acres was valued at the same sum. This is not sufficient evidence of value for us to find what the real value was, which is what appellant is entitled to; not a fictitious value fixed by the parties upon their respective lands in effecting an exchange. We think we may rightfully assume that such a value is oftentimes far from the real value. Counsel for appellant should have introduced some evidence of the value of this twenty-five acres, if he intended requesting the court to make such a finding. Notwithstanding the evidence is in such an incomplete condition, it being the duty of the court, after reaching the conclusion it announced, to have disposed of the whole issue, it should have requested evidence upon which to base a value and complete the decree, and not leave the case disposed of as to the fifteen acres but undisposed of as to the twenty-five acres.

Respondents contend that no issue was made as to the twenty-five acres and no reference to its sale was made in any pleadings. That is immaterial. Issue was raised as to the rights of the parties in and to the entire tract, and each party prayed for a decree adjudging such issue, thus submitting the whole controversy to the court; and when the court found with appellant upon the facts and law, its decree should have given her all the relief to which it had found her entitled.

The decree is correct so far as it goes, but it does not go far enough. It is, therefore, set aside, and the cause remanded with instructions to the lower court to take evidence as to the value of the twenty-five acres at the time of its sale or exchange, and then enter a decree directing conveyance of the fifteen acres to appellant, and awarding her judgment in the

sum found as the value of the twenty-five acres at the time indicated.

Crow, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 10590. Department One. January 8, 1914.]

GERMAN-AMERICAN STATE BANK, *Appellant*, v. SOAP LAKE
SALTS REMEDY COMPANY *et al.*, *Respondents*.¹

CORPORATIONS—STOCK — SUBSCRIPTIONS — PAYMENT IN PROPERTY—OVERVALUATION—LIABILITY TO CREDITORS. Where an insolvent corporation conveyed all its assets to a clerk of one of its officers, who subscribed for all the stock of a reorganized company, transferring the assets to it in full payment of the stock, which she transferred proportionally to the stockholders of the old company, such stockholders are subscribers to the stock of the new company, and having paid but a nominal consideration for their stock, they are liable to creditors on their unpaid stock subscriptions, on the trust fund theory, requiring stock to be paid for in money or money's worth.

BANKS AND BANKING—REPRESENTATION—OFFICERS—ADVERSE INTERESTS—NOTICE. Where the president and cashier of a bank extended credit to, and permitted overdrafts by, an insolvent corporation in which they were interested as stockholders with full knowledge of its affairs, in an action on their unpaid stock subscriptions for the benefit of the bank as principal creditor, it cannot be claimed that the bank was estopped by the knowledge of its president and cashier, who were adversely interested and who had failed to give notice of conditions to any of the other trustees or officers of the bank.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered February 6, 1912, dismissing an action on contract, upon granting a nonsuit. Reversed.

Voorhees & Canfield, for appellant.

Vanderveer & Cummings and *H. McC. Billingsley*, for respondents.

Crow, C. J.—Action by German-American State Bank, a corporation, upon two promissory notes, executed by the Soap Lake Salts Remedy Company, a corporation, and to

¹Reported in 137 Pac. 461.

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recover from C. H. Clodius, A. O. Kuck and J. W. McBurney and H. E. Christensen, their unpaid subscription to the capital stock of the defendant corporation. The defendant corporation interposed a demurrer to the complaint, which was overruled, and after its failure to further plead, plaintiff claimed a default. The remaining defendants answered separately. At the close of plaintiff's evidence, a nonsuit was entered as to each and all of the defendants. The plaintiff has appealed.

Pending the appeal, H. E. Christensen died testate, and J. W. McBurney, his executor, has been substituted as respondent. As McBurney is a respondent in his personal capacity, we will refer to Christensen as a respondent in all matters which, prior to his decease, affected him.

About June, 1907, a corporation known as the Soap Lake Salts & Oil Company, hereafter called the oil company, was organized, with a capital stock of \$50,000, respondents J. W. McBurney, C. H. Clodius, O. A. Kuck, and H. E. Christensen being a portion of the stockholders. After continuing for about a year, it proved an unprofitable concern, doing a business of about \$500 a month, with operating expenses largely in excess thereof. It incurred a number of liabilities which it could not pay, including an indebtedness of about \$1,500 to the appellant bank, in the form of an overdraft. The stockholders and trustees thereupon determined to organize a new corporation, to be known as the Soap Lake Salts Remedy Company, hereafter called the remedy company, one of the respondents herein. The remedy company was incorporated for \$200,000, and one Miss M. E. Wagner, a stenographer and employee of one of the respondents, subscribed for its entire capital stock, with the exception of about six shares, which were subscribed by the incorporators. All assets of the oil company were conveyed to Miss Wagner, who forthwith conveyed the same to the remedy company in full payment of her stock subscription. Stockholders in the oil company thereupon surrendered their

stock in that company to Miss Wagner, and received in exchange a proportionate amount of stock in the remedy company. Respondents Clodius and Christensen, president and cashier of the appellant bank, as such, extended credit to the oil company by permitting the overdraft above mentioned. This overdraft seems to have been assumed by the remedy company, which increased it until it reached \$2,104.08. On November 24th, 1908, the remedy company, to decrease this overdraft, executed and delivered to the appellant bank its promissory note for \$2,000, the same being one of the notes upon which this action is based. Thereafter, the remedy company again overdrew its account with the appellant bank, and on December 10, 1909, in settlement, executed and delivered to the appellant its second promissory note for \$1,840.55, the same being the second note upon which this action is based. The assets which the oil company conveyed to Miss Wagner, and which she in turn conveyed to the remedy company, included 153 acres of land in Grant county, of the value of about \$6,000, subject to an unpaid purchase money mortgage for \$5,000; and further consisted of certain personal property, of a total value not exceeding \$5,000.

It is conceded that the remedy company has ceased doing business; that it has lost the real estate in a foreclosure proceeding; that its other assets are practically valueless; that it is insolvent; and that appellant cannot recover on its notes, unless it can recover from the respondent stockholders on their unpaid stock subscriptions. It is not necessary to enter upon a minute statement of the facts, or detail the number of shares of stock held by each respondent in the remedy company. It may be mentioned that stock of the face value of about \$76,000 was turned into the treasury of the remedy company to be held and sold as treasury stock. We are satisfied the evidence was sufficient to show that respondents were subscribers to their stock; that they acquired the same with full knowledge of all the transactions and dealings in-

volved in the organization of the remedy company, and that nothing more than a nominal consideration was paid by them for the stock which they now hold. Their liability to creditors of the insolvent corporation, upon their unpaid stock subscriptions, is well established by former rulings of this court. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833; *Grady v. Graham*, 64 Wash. 436, 116 Pac. 1098, 36 L. R. A. (N. S.) 177; *Lantz v. Moeller*, 76 Wash. 429, 136 Pac. 687. The evidence in this case convinces us that the subscribed capital stock now held by respondents, has never been paid either in cash or in property of an equivalent value.

In the *Adamant Mfg. Co.* case, *supra*, the late Chief Justice Dunbar said:

"It must necessarily follow, for the protection of creditors who dealt with these corporations, that the stock subscribed for must be paid in cash or in property of an equivalent value. In other words, the corporation must be in the actual condition which it represents itself to be, in financially. If it were allowed to hold itself out as having a capital stock of \$100,000, when in reality the capital stock, which is and must be, under the theory of the law, assets in the hands of the corporation, is worth only one-half that amount, the corporation is to that extent doing business under false colors, and is obtaining credit upon the faith of an asserted estate which is purely fictitious. And where, by any arrangement between the shareholders and the corporation, the stock is issued as fully paid up, when in fact it has not been paid to the full amount of its face value, but has been paid in property of a fictitious or inflated value, a court of equity will compel a payment by the stockholder for the benefit of the creditor who has dealt with the corporation relying upon the asserted value of its assets to the full amount or face value of the stock. Such is almost the universal holding of the courts of the present day. See *First National Bank v. Gustin etc. Mining Co.*, 42 Minn. 327 (44 N. W. 198, 18 Am. St. Rep. 510); *Taylor, Private Corporations*, § 702. The latter authority lays down the rule as follows: 'To issue

shares as fully paid up for property known to the corporation and the shareholder receiving them to be materially below their par value, is a fraud on creditors, for whose benefit the shareholder to whom the shares are issued may be compelled to make up the difference.' "

In view of the respondents' statements, we find it unnecessary to discuss their liability under the facts shown. In their answering brief, they say:

"Now it is not contended here, nor has it ever been contended, that Miss Wagner paid the full face value of her stock. It is not contended here, nor has it ever been contended, that the assets of the old company were worth \$200,000, or anything like such sum. The trade-marks, the patents and the good will had a purely speculative value, and it was the hope of the stockholders in the old company that the sale of the 76,000 shares of treasury stock, would give the new company a working capital to carry its enterprise to success. It is not contended here, nor has it ever been contended, that the property transferred to the new company had a present worth of \$200,000; but it is contended that no fraud was intended or accomplished upon any of the creditors of the Soap Lake Salts Remedy Company, and particularly the appellant bank."

It is conceded that the respondents Clodius and Christensen were respectively president and cashier of the appellant bank. As they were also stockholders in the remedy company, the respondents contend that they had full knowledge of its organization, history, and assets and condition; that, through them, the appellant bank had such knowledge, as their knowledge was that of the bank; that the bank did not rely upon the stock subscriptions in extending credit; that it has not been defrauded, and that it cannot recover in this action. In their brief, respondents say:

"The respondent's answer frankly stated that the old company could not meet its obligations, and that the sole object of the new organization was to obtain funds from the sale of stock to pay off the debts of the old company and continue the business. The entire method, the objects and

purposes of the new organization were given in detail. The sole defense urged was that the appellant in extending credit to the new company had full knowledge of all the facts, and had not only consented to the reorganization and consented to look to the new company for the indebtedness of the old, but that in extending credit to the new company it had agreed to rely 'entirely upon the real and existing assets, and upon the prospects of the Soap Lake Salts Remedy Company, and not upon any contingent liability, real or supposed, of the stockholders of the Soap Lake Salts & Oil Company, who had accepted the stock of the Soap Lake Salts Remedy Company under the circumstances hereinbefore mentioned and described.' "

Respondents rely on the rule that, if a person, in dealing with a corporation, extends credit to it, knowing that its capital stock, has been issued in exchange for property of less than its par value, he cannot thereafter recover from the individual stockholders.

Appellant, while conceding the rule that, whatever is known to the managing officers of the corporation, is known to the corporation itself, insists upon an exception which it now invokes, to the effect that, when an officer of a corporation is engaged in perpetrating a fraud on his corporation or is dealing with it for his own personal profit or interest, the knowledge which he possesses will not be imputed to the corporation. There was evidence sufficient to show that Clodius and Christensen were active participants in the organization of the remedy company; that they knew all transactions by which its stock was issued in exchange for the comparatively worthless assets of the old corporation; that, having thus participated, and having such knowledge, they became stockholders in the remedy company and continued at all times to hold their stock; that they were stockholders in the old company, and that they, as president and cashier of the appellant bank, permitted the overdrafts. There was also evidence that the bank had seven other trustees, two of whom testified that they had no knowledge of the overdraft or the notes of the remedy company. No showing

was made as to what knowledge, if any, the other trustees had, nor is there any evidence that any of the trustees other than Clodius and Christensen knew whether the stock subscriptions of the remedy company were paid or unpaid. It is difficult to conceive that any board of trustees would have approved or ratified the overdraft, had they been familiar with the financial condition of the remedy company. Clodius and Christensen were interested in securing funds for the remedy company to insure its continuance in business. Being thus interested, their conduct as president and cashier of the bank, in permitting the overdraft, cannot now be taken advantage of by themselves or other stockholders of the remedy company without further proof of knowledge on the part of the bank than is disclosed by the record. Upon the facts shown, their knowledge, which they obtained as interested parties and stockholders in the remedy company, will not be imputed to the appellant bank, or deprive it of the right to seek relief by enforcing the statutory liability of the subscribing stockholders of the remedy company.

Although the facts involved are not entirely similar, we regard the announcement of this court in *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225, as applicable to this case. We there said:

"The respondent will be presumed to know that an officer in a corporation, however extensive his apparent authority may be, may not bind his principal in a matter in which he is adversely interested. Mooney could not at the same time act for himself and for his principal, without the full knowledge and free consent of the principal. *O'Conner Min. etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 19 South. 290, 36 Am. St. 251; *Gallery v. National Ex. Bank*, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149. An officer who receives the note or other obligation of a corporation in payment of the personal debt of an officer with whom he deals does so at his peril. The reason is that such a transaction is not in the regular course, but is presumptively *ultra vires*."

We are not unmindful of the fact that the overdrafts continuously appeared on the bank books; that the trustees had

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access to these books; that all of the trustees did not testify, and that only two did testify, denying knowledge of the affairs of the remedy company; yet there is no evidence that Clodius and Christensen communicated to the bank, or any of its officers, the knowledge which they possessed. On the contrary, the indications seem to be, and the natural presumption under the circumstances would be, that they did not do so, and that the other officers of the bank, if they had notice of the overdrafts, were relying on the \$200,000 subscribed capital stock of the remedy company as a trust fund to secure all of its liabilities.

Upon the record, we hold there was sufficient evidence to sustain a recovery against the respondent stockholders, in the absence of any defense or evidence to the contrary. The motion for a nonsuit should have been denied as to each and all of the defendants.

The judgment is reversed, and the cause is remanded for a new trial.

MOUNT, CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 11415. Department Two. January 8, 1914.]

W. D. WOHLFORTH, *Respondent*, v. CHRIST. KUPPLER,
Appellant.¹

PLEADING—ANSWER—ARGUMENTATIVE DENIAL—REPLY. Where new matter in an answer setting up defendant's version of the transaction amounts only to a denial of the complaint, a reply thereto is not necessary.

CONTRACTS—BREACH—DEFENSES. It is no defense to an action for the breach of a contract to employ the plaintiff to do the plastering of a building, under construction by defendant, that the architects had not consented to a subcontract, as required in the principal contract, where it did not appear that his consent had been asked or that he had refused consent; especially where the defendant was the one who should have secured such consent.

¹Reported in 137 Pac. 477.

WITNESSES—FEES—MILEAGE. Costs may be taxed for the mileage of a witness coming to attend the trial from Oregon, where his business was located, although his home was in Seattle.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 10, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for breach of contract. Affirmed.

Van Nuys & Hunter, for appellant.

John W. Roberts and George L. Spirk, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages which he alleges resulted to him from the failure of the defendant to permit him to do the plastering in the construction of a school building, at Port Angeles, in pursuance of a contract entered into between them. The plaintiff claims damages measured by the loss of profit which he would have made had he been permitted to proceed with his contract for the plastering. The defendant had the contract for the construction of the entire building. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff for \$400, from which the defendant has appealed.

It is first contended by counsel for appellant that the trial court erred in denying their motion for judgment upon the pleadings, made at the commencement of the trial. This motion was rested principally upon the alleged insufficiency of respondent's reply to the new matter set up in appellant's answer. In answer to this contention, we think it is sufficient to say that we regard the new matter alleged in appellant's answer as amounting to little more, in legal effect, than a denial of the facts alleged in respondent's complaint. It does little else than set up appellant's version of the dealings between him and respondent, which only negatives the allegations of the complaint. Under such circumstances, the reply is of but little consequence. It may be well doubted that a reply was necessary at all in this case. In any event, it denied all new matter in the answer which called for denial

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by reply. *Davidson Fruit Co. v. Produce Distributors Co.*, 74 Wash. 551, 134 Pac. 510; *Smith Sand & Gravel Co. v. Corbin*, 75 Wash. 635, 135 Pac. 472. We think there was clearly no error in denying the motion for judgment on the pleadings.

The specifications for the construction of the building, which were a part of the contract between appellant and the school board, provided that "the contractor shall not assign or sublet the whole or any part of his contract work without the written consent of the architects." Counsel upon both sides assume that no such written consent was ever given as to the contract between the parties here. The record is absolutely silent as to whether such consent was ever asked for, or whether it would have been denied if asked for. It seems, from the record, that it is fair to assume that there was no occasion to ask for such consent, since it is plain that respondent was prevented by appellant from proceeding with the plastering of the building. It is contended on behalf of appellant that the contract was illegal, and therefore no contract, because made, if at all, in violation of this provision of the specifications in the original contract. If it affirmatively appeared that the consent of the architects to this contract had been refused, or that it could, in no event, have been procured, there would be some merit in the contention of counsel for appellant, in view of the fact that respondent knew of this provision in the original specifications, upon which he figured. But it is not claimed, nor even hinted in this record, that appellant could not have procured the consent of the architects to respondent's plastering the building. It seems to us that appellant cannot be heard to deny the binding force of the contract, in the absence of any showing whatever on the question of the architects' consent. It was, at least, appellant's duty to request such consent. He was the one who was dealing directly with the architects and the school authorities; and while it might not be said that he guaranteed the consent of the architects

when he entered into the contract with respondent, he at least should have made some effort looking to the procuring of the architects' consent. Counsel for appellant rely principally upon *Tribou v. School District etc.*, 66 Wash. 703, 119 Pac. 838, in support of their contention that the contract is illegal and unenforceable. In that case, however, the question of the validity and binding force of the subcontract was involved in a controversy as to the rights of the school district, which knew nothing of the subcontract. We are of the opinion that, this being a controversy between the contractor and the subcontractor, that case is in no wise controlling. There is nothing before us to indicate that the contract here involved was illegal or unenforceable as between these parties. That it may have been rendered so for want of consent of the architects, does not argue against its validity and binding force, in the absence of any showing whatever touching the procuring of the architects' consent.

It is contended that the trial court erred in denying appellant's motion to retax costs by striking therefrom an item of \$32, for mileage of a witness coming from Oregon to attend the trial to testify in behalf of respondent. This contention is rested upon the theory that, because the witness was a resident of Seattle, he was not entitled to mileage from the state line, in coming to attend the trial. The record shows that, while this witness had his home in Seattle, he had, for the previous several months, been in Portland, in the state of Oregon, where his entire business interests are located. We think, under such circumstances, he was entitled to mileage the same as if he were a permanent resident of the state of Oregon. We think the spirit of the law does not require a witness to come from a distance, where his business is permanently located, to attend a trial without the usual mileage fees, any more than as if his residence were at such place. Had his home been there, he would, of course, have

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been entitled to mileage as a witness. *Carlson Bros. & Co. v. Van De Vanter*, 19 Wash. 32, 52 Pac. 323.

It is strenuously argued that the trial court erred in declining to take the case from the jury and decide it in favor of appellant, as a matter of law, upon the conclusion of the evidence, when the sufficiency of the evidence was challenged by respondent. This contention involves only questions of fact touching the question of the making of the contract here involved. We deem it sufficient to say that we have read all the evidence brought here, and conclude that it is ample to support the verdict, which included the finding by the jury that the contract was actually entered into.

The judgment is affirmed.

Crow, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

[No. 11270. Department One. January 8, 1914.]

MARY E. MORGAN, *Respondent*, v. ANDREW WILLIAMS, as
Sheriff, Appellant, FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, *Defendant*.¹

APPEAL—DECISION—REVERSAL—ERROR OF LAW. The reversal of a judgment against a sheriff for damages for a false return in a divorce case, on the ground that the plaintiff's evidence showed that she had mistaken her remedy, was for error of law, and not because the judgment was void.

JUDGMENT—VACATION—GROUNDS—ERROR OF LAW. A valid judgment cannot be vacated by the trial court for error of law, which can be reviewed only on appeal.

APPEAL—DECISION—PARTIES NOT APPEALING—BENEFIT OF REVERSAL. A sheriff, who failed to appeal from a judgment for damages for a false return, or to join in the appeal by his codefendant, the surety on his bond, cannot benefit from the reversal of the judgment on the surety's appeal, in view of Rem. & Bal. Code, § 1720, providing that parties not appealing or joining shall not derive any benefit from the appeal "unless from the necessity of the case;" the statute contemplating only an absolute necessity, in that no judgment would under any circumstances be valid as to one and not to the others.

¹Reported in 137 Pac. 476.

Appeal from an order of the superior court for Whatcom county, Pemberton, J., entered February 20, 1913, refusing to vacate a judgment, after a hearing before the court. Affirmed.

C. A. Swartz, for appellant.

ELLIS, J.—This is an appeal from an order overruling a motion to vacate a judgment. The action was brought by Mary E. Morgan, as plaintiff, against Andrew Williams, as sheriff of Whatcom county, and the Fidelity and Deposit Company of Maryland, as surety on his official bond, to recover damages for an alleged false return of service upon Mary E. Morgan of a summons and complaint in an action for divorce brought by her former husband. The defendant Williams demurred generally to the complaint, and the demurrer was overruled. Separate answers were filed by the defendants, and, on issue joined, the jury returned a verdict against both defendants for the sum of \$1,700. Judgment was entered thereon on the 24th day of March, 1911. The defendant Williams moved to set aside the verdict, and for a new trial. Both motions were overruled. The defendant Fidelity and Deposit Company of Maryland appealed to this court, but the defendant Williams neither appealed separately nor joined in the appeal of his codefendant. On that appeal, this court, in an opinion filed January 19, 1912, *Morgan v. Fidelity & Deposit Co.*, 66 Wash. 649, 120 Pac. 106, 38 L. R. A. (N. S.) 292, reversed the judgment against the Deposit Company, and remanded the cause with direction to enter a judgment in favor of that company.

The defendant Williams, on March 23, 1912, moved to vacate and set aside the judgment against him on the grounds: (1) that the judgment was irregularly obtained and without warrant of law; (2) that the judgment was obtained through fraud, misrepresentation and wrong of the plaintiff; (3) that the complaint did not state a cause of

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action. From the order of the trial court overruling this motion, the defendant Williams now appeals.

On the former appeal, we held that the demurrer of the Fidelity and Deposit Company of Maryland to the complaint, on the ground that it did not state a cause of action, aided by the evidence, which established an estoppel as against the plaintiff to question the validity of the decree of divorce, demonstrated that the plaintiff had mistaken her remedy; and that her proper remedy, under the allegations of her complaint, as aided by her own evidence, was to be found in an action against her former husband on his agreement to pay a greater amount than that fixed for the family allowance in the decree of divorce.

It is manifest, therefore, that the judgment against the surety company was reversed for error of law on the part of the trial court; that is, error in applying the law to the facts as pleaded and established. The judgment was not held void, but was reversed for error of law. It is this same error of law which is now urged as a ground for vacating the judgment as to the defendant Williams, appellant here. This is manifest from the fact that our decision on the appeal of the surety company is urged as the real ground for the vacation of the judgment as against this appellant, Williams. The case thus falls squarely within the rule announced in *Dickson v. Matheson*, 12 Wash. 196, 40 Pac. 725, and *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182. In the first of those cases, it is said:

"The final judgment pronounced upon a hearing upon the merits cannot be set aside by the petition under the statute for mere error into which the court may have fallen."

In *Kuhn v. Mason*, *supra*, it is said:

"The right to a vacation of judgments, while it existed at common law for certain specific reasons, viz., fraud and collusion, is in this state statutory; and, if appellant brings himself within the statute at all, it is within the provisions of subd. 3, of § 1, chapter 17, title 28, Bal. Code [Rem. &

Bal. Code, § 464, subdiv. 3], which provides for the vacation of a judgment for mistakes, neglect or omission of the clerk or irregularity in obtaining the judgment or order. There is no mistake, neglect, or omission of the clerk alleged, but it is alleged that the judgment was irregularly obtained. But the irregularity provided for by the statute does not mean an irregularity such as is shown by the petition in this case, viz., that the court misconstrued the law. Irregularities which are generally invoked for the purpose of vacating a judgment, and which will justify a vacation of the judgment after term time, are where a judgment was entered in favor of the plaintiff before the time for answering had expired, or where the judgment was entered while there was an answer or demurrer on file and not yet disposed of, and other irregularities of this character."

This same rule is reannounced, and the foregoing language from *Kuhn v. Mason* is quoted with approval, in *Warren v. Hershberg*, 52 Wash. 38, 100 Pac. 149. To hold that the trial court should have entertained this motion and vacated this judgment would be, in effect, to permit the trial court to entertain upon motion an appeal from its own judgment, review the law of the case and reverse itself for error of law. The statute under which the motion was made was never intended to have that effect.

"The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside the judgment on motion." 1 Black, Judgments (2d ed.), § 329.

The appellant, Williams, having failed to appeal from a judgment neither void upon its face nor void in fact, but merely erroneous, has lost his right to have that judgment reversed or set aside, either in this court or in the trial court.

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We are not impressed with the appellant's contention that he must "from the necessity of the case," profit by the successful appeal of his codefendant in which he did not join, under the provisions of Rem. & Bal. Code, § 1720 (P. C. 81 § 1191). That section provides, in effect, that any party who does not join in the appeal, nor prosecute an independent appeal, from a final judgment shall not derive any benefit from the appeal unless from the necessity of the case. The necessity of the case contemplated by that statute is an absolute necessity; that it to say, one arising from the inherent nature of the case in that no judgment rendered could, under any circumstances, be valid as to one of the parties and not as to the others. Obviously, this is not such a case. We find no error in the refusal of the trial court to vacate the judgment.

The order is affirmed.

CROW, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[No. 11462. Department One. January 8, 1914.]

SPIROS BOUGAS, *Respondent*, v. ESCHBACH-BRUCE COMPANY,
Appellant.¹

MASTER AND SERVANT—DEFECTIVE APPLIANCE—SIMPLE TOOLS—DEFECTS—REPAIRS—ASSUMPTION OF RISKS. A clamp, similar to an ordinary clevis, used as a block on the rails to hold a steam shovel, is a simple tool, within the rule that an adult employee assumes the risks from simple tools in his exclusive use; hence plaintiff, who constantly used the clamp and frequently had it repaired, cannot recover for an injury sustained when a small piece of metal broke off the clamp key, when hit with a hammer, owing to the fact that a piece of hard steel had been welded into the key in repairing it when soft steel should have been used.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered April 10, 1913, upon the verdict

¹Reported in 137 Pac. 472.

of a jury rendered in favor of the plaintiff, for personal injuries sustained by a pit man in steam shovel work. Reversed.

William B. Clark, for appellant.

Thos. H. Wilson, for respondent.

GOSK, J.—This action is founded on the alleged negligence of the defendant in failing to use reasonable care in repairing a clamp key. Verdict and judgment for plaintiff. The defendant has appealed.

The appellant was operating a steam shovel, in Umatilla county, in the state of Oregon, at the time respondent sustained the injury complained of. The respondent was in its employ as one of the pit men. His particular duties were to attach an iron or steel clamp to the steel rail of the track upon which the car containing the steam shovel was operated, and to remove it when the car eased off for the purpose of moving. When the car was at the desired place, its wheels were blocked by a railroad tie placed against the clamp. The clamp, while larger, was similar to an ordinary clevis. It rested upon the rail, and was held in place by a key inserted through its eyes beneath the rail. The clamp was attached when the car was stationary, and removed when the car eased off preparatory to moving, and was reattached when the car again became stationary. The key was driven in and out by means of a small sledge hammer. The clamp and key were made by a smith employed by the appellant. Respondent was twenty-seven years of age, and had been engaged in the particular work about fifty-eight days, when, in driving out the key, a small piece of metal broke from the key and penetrated and destroyed his eye. The complaint alleges, that the key was originally made of soft steel, that it spread at the end from constant hammering, and that a blacksmith in the employ of the appellant, in reshaping it and without the knowledge of the respondent, welded a piece of hard, brittle

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steel into the small end. The respondent used the key in the usual way for two or three days after the last repair before he met his injury.

The only negligence charged, or sought to be proven, is in the repair of the key. There is no charge that the smith was incompetent. The witnesses agree that such a key should be made of mild or soft steel. The respondent testified that, from time to time as the key became blunt from use, he reported the fact to the engineer, who in turn directed him to take it to the smith for repair. He said he had it repaired many times. He also said that he always used the same clevis and key. He further testified that, after the injury, he noticed that the small end of the key had a blue color, and that he then observed that, in repairing it the last time, hard steel had been welded in the small end. The key was not produced at the trial.

The respondent invokes the rule that it is the duty of the master to use reasonable care to keep the instrumentalities used in the work in a reasonably safe condition. He argues that this duty is nondelegable, and that the facts stated support the verdict. On the other hand, the appellant, while conceding the rule in proper cases, insists that, in cases of simple tools, the master is exempt from the duty to inspect for the purpose of ascertaining the development of defects or disrepair in the course of their use, because such conditions are as much within the observation of the employee as the master. Hence it is said that no liability rested on the master for the ordinary perils resulting from latent and unusual defects which, from the simple nature of the appliance, are known to all men alike. In keeping with these views, the appellant seasonably moved for a nonsuit and directed verdict and a judgment *non obstante*.

As applied to experienced adults, where the tool is simple and in the exclusive use of the employee, the courts are practically a unit in holding that the employee assumes the usual and ordinary risks incident to their use. *Cole v. Spokane*

Gas & Fuel Co., 66 Wash. 398, 119 Pac. 831; *Stork v. Stolper Cooperage Co.*, 127 Wis. 318, 106 N. W. 841; *Borden v. Daisy Roller Mill Co.*, 98 Wis. 407, 74 N. W. 91, 67 Am. St. 816; *Garnett v. Phoenix Bridge Co.*, 98 Fed. 192; *Louisville etc. R. Co. v. Allen*, 47 Ill. App. 465; *Martin v. Highland Park Mfg. Co.*, 128 N. C. 264, 38 S. E. 876, 83 Am. St. 671; *Vanderpool v. Partridge*, 79 Neb. 165, 112 N. W. 318, 13 L. R. A. (N. S.) 668 and foot note; *Lynn v. Glucose Sugar Co.*, 128 Iowa 501, 104 N. W. 577.

In the *Cole* case, the plaintiff was carrying coke in an iron pan with two handles projecting lengthwise from the ends so that a man could walk between them. One of the handles slipped in his hand and fell, causing the injury complained of. In holding that there was no negligence, the court said:

"The rule seems well established that an instrument of simple structure, presenting no complicated question of power, motion or construction, and intelligible in all of its parts to the dullest intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument and brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects;"

citing numerous cases. In the *Vanderpool* case, the plaintiff, while cutting holes in a brick wall with a two-pound hammer and a chisel made from an old rasp, was struck in the eye with a chip or sliver from the end of the rasp, causing the loss of the eye. He had been using a cold chisel and took the rasp at the instance of the foreman. After reviewing the authorities, the court said:

"From these cases and the many citations therein contained, it is apparent that the master is not liable for injuries resulting from latent defects in simple tools or appliances, such as a hammer, saw, chisel, and the like. The reason for the rule is that any defect in such simple tools or appliances would be as obvious to the servant as to the master, and the underlying reason in all the cases for holding the master accountable for injuries resulting from imperfect

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or defective tools and appliances is that the servant is ordinarily presumed to have no knowledge of the dangers incident to their use. But, as we have seen, the rule has no application to the simpler tools and appliances."

The following have been held to be simple tools within the rule stated: A backing hammer, a buffer, chisels, claw bars, crow bars, driftpins, dolly bars, a fork used in a dye house, a hook with a short handle used for moving timbers in a sawmill, lifting jacks, machine hammers, mauls, monkey wrenches, pinch bars, prize poles, punches, rivet hammers, snap hammers, soft heads, and wrenches. 13 L. R. A., foot note, p. 670.

The clamp and key do not differ from the ordinary tools and implements used upon the farm, such as lines, tugs, neck yokes, double trees, lead bars, lead chains, clevises, hammers, nails, axes, wire stretchers, brake rods, and many other simple tools in daily use upon the farm. In the use of such simple tools, the employer has a right to assume that the experienced adult employee who is constantly handling them will observe and report any disrepair that may occur in their use, and if repair becomes necessary, the master has discharged his full duty when he has had them repaired by a competent workman.

The respondent cites *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016. In that case a wheel dropped from a heavily loaded truck which the plaintiff and another were wheeling. Using the truck was only an incident to the plaintiff's general work as a mechanic. There were five or six trucks furnished and used indiscriminately by the employees, each employee using the one that happened to be convenient. Upon these facts, it was held that the jury were justified in finding that the duty of inspection was not cast upon the plaintiff. The respondent also cites *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 S. W. 790, 9 Am. St. 351. In that case, the injured party testified that he examined the tool after its repair, and that it appeared well

dressed and in good shape. In the case at bar, the respondent testified that he examined the key after he met his injury; that he then observed that the color of the small end was different from the color of the other part of the key, and that he then discovered that a piece of steel had been welded into the small end. He does not testify that he made any examination before he was injured. However, the Missouri case, as applied to the facts at bar, stands practically alone. Cases may be found where the rule we are announcing has not been extended to infants, inexperienced young men, and employees who were using the tool for the first time in obedience to the direction of the master.

This court has been exceedingly liberal in holding to the rule that, ordinarily, the duty of the master to furnish a safe place and safe tools for its employees is a nondelegable duty. The rule, however, is rested upon the ground that the knowledge of the master is superior to that of the employee; and when the reason for the rule fails, the rule itself must fail.

We think, upon the evidence, the court should have directed a judgment for the appellant. The judgment is reversed with directions to dismiss.

Crow, C. J., Chadwick, Ellis, and Main, JJ., concur.

[No. 10547. Department Two. January 8, 1914.]

PACIFIC COAST BISCUIT COMPANY, *Respondent*, v. I. D. PERRY,
Garnishee Defendant and Appellant,
WILLIAM OSWALD, *Defendant*.¹

CHATTEL MORTGAGES—FAILURE TO RECORD—VALIDITY—SUBSEQUENT CREDITORS. Although Rem. & Bal. Code, § 3660, provides that a chattel mortgage is void as against creditors unless recorded, an unrecorded chattel mortgage is valid as between the parties and creditors subsequent to its execution who acquired no specific lien upon the property up to the time when it was finally filed for record.

¹Reported in 137 Pac. 483.

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Opinion Per MOUNT, J.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 1, 1912, in favor of the plaintiff, upon stipulated facts, in garnishee proceedings. Reversed.

James C. McKnight, for appellant.

Nelson R. Anderson, for respondent.

MOUNT, J.—The appellant is a garnishee defendant in the case of Pacific Coast Biscuit Company v. William Oswald. This appeal is prosecuted from a judgment of the superior court for King county finding that certain property in the possession of the appellant was the property of William Oswald.

The respondent appeared in this court and moved to dismiss the appeal. This motion was denied. The respondent has filed no brief on the merits, so that we are not advised of his position except as stated by the appellant.

The facts in the case were stipulated. There is no dispute upon the facts. It appears from the stipulation that, in April, 1911, William Oswald was indebted to the appellant, I. D. Perry, in the sum of \$450. On that date Mr. Oswald, in order to secure the payment of this indebtedness, executed a chattel mortgage upon a certain stock of goods and fixtures belonging to him. The mortgage was made in good faith and without any desire to hinder or delay creditors. The mortgage was properly acknowledged and verified, and delivered to the mortgagee, Mr. Perry. It was not filed for record until September 7, 1911. Between the date of the execution of the mortgage and the date it was filed, several persons became creditors of Mr. Oswald. On the day the mortgage was filed, viz.: September 7, 1911, Mr. Perry proceeded to foreclose the same by notice and sale under the statute. The sheriff took possession of the stock of goods and fixtures, and thereafter regularly sold the same. At the sheriff's sale, Mr. Perry became the purchaser for the sum

of \$362.92, which it is agreed was the reasonable value thereof. Mr. Perry has ever since been in possession of the goods, selling and replacing the same with other goods. Thereafter, on the 6th day of November, 1911, the Pacific Coast Biscuit Company secured a judgment against Mr. Oswald, upon debts that were contracted between the month of April and the month of September, 1911. After this judgment was obtained, a writ of garnishment was served upon Mr. Perry. This writ was based upon an affidavit that Mr. Perry was indebted to Mr. Oswald, or had property in his possession belonging to Mr. Oswald. Mr. Perry thereupon denied that he was indebted to Mr. Oswald, or that he had any property in his possession belonging to Mr. Oswald.

Upon these facts, the trial court concluded that the chattel mortgage, executed in April and filed in September, 1911, was void as to creditors between those dates, and therefore the mortgage foreclosure was void and the property obtained by Mr. Perry under the foreclosure was the property of Mr. Oswald; and a judgment was thereupon entered ordering the property in the possession of Mr. Perry to be turned over to the sheriff to satisfy the judgment obtained by the Pacific Coast Biscuit Company against Mr. Oswald.

Apparently the respondent and the trial court rely upon the case of *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190, 40 Pac. 729. That was a case where a chattel mortgage had been given on December 22, 1893, and was not recorded until May 4, 1894. In the meantime, an action was instituted by other creditors of the mortgagor, and on May 7th, a receiver was appointed and took possession of the property of the mortgagor. The court in that case construed the provisions of Rem. & Bal. Code, § 3660 (P. C. 349 § 3), and held that an unrecorded chattel mortgage was void as to creditors between the date of its execution and the time of recording, whether the creditors acquired a specific lien against the property or not. The logic of that case undoubtedly supports the judgment appealed from in this

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case. But the court in that case appears not to have carefully considered the question whether such mortgage, after being filed for record, became valid as of the time it was filed.

There can be no doubt, under the statute, that a mortgage of personal property is void as against creditors unless it is recorded in the same manner as is required by law for conveyances of real property, because the statute so states. But we are satisfied that this statute does not mean that an unrecorded mortgage may not thereafter be recorded in compliance with the statute, and become effective after the date of such recording as to all creditors, both prior and subsequent.

There is no doubt that a debtor in this state has a right to prefer a creditor, except in cases of insolvency. If this mortgage had been recorded immediately after it was given, it would have been a valid mortgage as against all persons not having a prior lien. But not having been recorded, the mortgage became void as to creditors and as to subsequent incumbrancers for value and in good faith. It was clearly within the power of the debtor to make a new mortgage on September 7, 1911, which mortgage would have been valid as against creditors from the time of making and filing for record. Instead of making a new mortgage, the appellant filed his old mortgage for record. There were, at that time, other creditors, but they were simply general creditors. They had no lien upon any specific property. When the mortgage was filed for record, it became immediately effective as of the date it was filed, the same as a mortgage made on that date. It seems to us that there can be no escape from this conclusion. In *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211, we said:

"Whether properly recorded or not, the mortgage was valid as between the mortgagor and mortgagee, and it is only creditors who have acquired some form of lien upon the mort-

gaged property that can question the right of the mortgagee to foreclose against such mortgaged property.”

This is the general rule.

The conceded facts in this case show that the Pacific Coast Biscuit Company had no specific lien upon any property of the mortgagor at the time the mortgage was filed for record on September 7, 1911. Up to that time, under many decisions of this court, the mortgage was void as to creditors. But when it was filed for record, and when the mortgagee took possession of the property, as he did in this case, his lien became perfect and superior to the claim of the other creditors having no specific lien. We think there can be no doubt of the correctness of this position under the statute.

In so far as the case of *Willamette Casket Co. v. Cross Undertaking Co.*, *supra*, may be said to hold that an unrecorded mortgage is absolutely void and may not become valid when properly filed, that case must be overruled. Under the conceded facts in this case, we think it is clear that the appellant, by reason of recording his mortgage prior to the judgment of the Pacific Coast Biscuit Company, obtained a first lien upon the property covered by the mortgage; and the sale thereof under his mortgage, being regular, passed title to the appellant and, that Oswald had no further interest in the property.

The judgment is therefore reversed, and the garnishment proceedings ordered dismissed.

CROW, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

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Opinion Per MOUNT, J.

[No. 11498. Department Two. January 8, 1914.]

JOHN L. CRAIB, *Respondent*, v. ANDREW PETERSON,
Appellant.¹

CONTRACTS—CONSTRUCTION—"PROFITS"—PERFORMANCE OR BREACH—MATURITY. Under a contract whereby a judgment creditor agreed to extend the time of payment of the debt for five months, in consideration of which the judgment debtor was to allow a third person to work his teams and grading outfit on a certain city job, at \$3.50 per day for each team, less the cost of feed not to exceed \$40 per month for each team, and less \$75 per month for himself, and the third person agreed to pay on the judgment one-half the net "profits" earned on the job by said teams and outfit, less the sum of \$75 per month for the services of the debtor and less certain interest charges, the same to be held until the completion of the job which completion should not extend beyond the period of five months, the word "profits" refers to the amount earned by the teams, less the feed bill and less \$75 a month for the services of the debtor and the interest, and not to "profits" on the city job; and the payment matures and is due at the end of five months, although the city job was not completed at that time.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 8, 1913, upon findings in favor of the plaintiff, in an action for an accounting. Affirmed.

Ballinger, Battle, Hulbert & Shorts (R. W. Capps, of counsel), for appellant.

Byers & Byers, for respondent.

MOUNT, J.—The plaintiff brought this action for an accounting, under a contract entered into between the plaintiff and the defendant and John Kalberg.

It was alleged in the complaint that there was a sum of money due the plaintiff under the contract, and that the defendant had failed to account therefor. The defendant admitted the execution of the contract, but denied that there was any money due thereunder, and alleged another contract

¹Reported in 137 Pac. 481.

executed on the same day between the defendant and a co-partnership, known as Kalberg & Brandon, which was part of the same transaction; that the plaintiff had notice and knowledge of the latter contract, and was bound thereby.

Upon the trial of the case, the lower court found in favor of the plaintiff and ordered an accounting. The defendant has appealed from that judgment.

The contract under which the plaintiff claims an accounting is admitted. It is as follows:

"Memorandum of Agreement, Between John L. Craib, party of the first part, John Kalberg, part of the second part, and Andrew Peterson, party of the third part, Witnesseth:

"That Whereas the said party of the first part has a claim against the party of the second part for \$1,350 besides interest, and the said party of the second part and his partner Brandon are owners of certain teams and outfit and operate under the name of Kalberg & Brandon, and the said party of the third part has a contract from the city of Seattle for grading and curbing 26th avenue, south, in the city of Seattle under ordinance No. 26,830 District 2480, and it has been agreed by the parties hereto that said first party shall waive his right to enforce the collection of his claim at the present time and to extend the time for payment to on or before five months from date hereof, and said party of the third part shall work the teams and outfit of Kalberg & Brandon on his said job, working as many of the teams and as much of the time as it is practicable to work, at the daily wage of \$3.50 per team and after deducting the keep of said teams not exceeding, however, the sum of \$40 per month per team, and interest on amount due the State Bank of Seattle, said third party shall pay to the said first party one-half the net profits of said teams and outfit less the sum of \$75 per month to be paid to the said Kalberg:

"Therefore, in consideration thereof and in payment of the portion of the profits and moneys the said first party hereby agrees and hereby does extend the time of the payment of his claim against the said second party, John Kalberg, to on or about five months from date hereof, said claim to bear interest from date to the maturity thereof at the legal rate.

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"Said second party hereby authorizes and directs the said third party to pay to the said John L. Craib, one-half the net profits earned on the said 26th avenue, south, job by the teams and outfit of Kalberg & Brandon less the sum of \$75 per month to be paid to the said party of the second party, and said second party hereby sells, assigns and transfers to the said first party one-half the net profits earned on the said 26th avenue, south, job by the teams and outfit of Kalberg & Brandon less the sum of \$75 per month to be paid by the said second party, but the amount to be paid out of said net profits to said first party shall not exceed the sum of \$1,350 and interest at the legal rate from the time the claim against said second party in favor of said first party matured.

"Said third party hereby agrees that he will work the teams and outfit of Kalberg & Brandon on said job whenever work is practicable and shall work as many teams as it is practicable to work and that he will pay one-half the net amount that is earned on said job by said teams and outfit less the sum of \$75 per month, to the said first party not exceeding the sum of \$1,350 and interest from the date of maturity of the claim against said second party and further agrees that the amounts to be deducted from the earnings of said team and outfit at the rate of \$3.50 per day per team shall be the keep of said teams, not to exceed, however, \$40 per month per team and interest on the loan of the State Bank of Seattle, which loan shall not exceed the sum of \$18,000; and further agrees that one-half the net profits on said teams and outfit less the sum of \$75 per month and not exceeding the sum of \$1,350 and interest shall be held by said third party until the completion of said contract, but the date of such completion shall not extend beyond the period of five months from the date hereof, and that at the completion of said contract the said portion of said profits shall be paid to said first party, but the sum so paid to said first party shall not exceed the sum of \$1,350 and interest.

"Dated at Seattle, Washington, February 26th, 1912."

It is argued by the appellant that the action was prematurely brought; that the respondent was not entitled, by virtue of his contract and his knowledge of the contract between the appellant and Kalberg & Brandon, to an accounting, ex-

cept out of the net profits of the work which was to be done under the latter contract. Upon the trial of the case, the court was of the opinion that the contract sued upon was ambiguous, and therefore admitted oral evidence of the circumstances which gave rise to the contracts at the time they were entered into, for the purpose of determining the meaning of the contract sued upon.

It will be noticed that the contract above set out is between three independent parties. It appears from the evidence that, at the time these contracts were entered into, the respondent had secured a judgment against John Kalberg, of the partnership of Kalberg & Brandon, and was endeavoring to enforce collection thereof. All the property of Kalberg was held under a mortgage by the State Bank of Seattle. This property was of the value of about \$40,000, and the bank's mortgage amounted to about \$18,000. There were other creditors, and it was agreed between the parties to the contract that, if the respondent would cease endeavoring to force collection of the judgment against Kalberg, the appellant Peterson would assume the obligation. Consequently this contract was entered into. The respondent was named as party of the first part, Kalberg as party of the second part, and Peterson, the appellant, party of the third part. By the terms of the contract, the respondent, in consideration of waiving his right to enforce the collection of his claim and extending the time for payment five months from the date of the contract, agreed that Peterson should work certain teams, about twenty-five in number, belonging to the co-partnership of Kalberg & Brandon, at \$3.50 per day per team, and after deducting the sum of \$40 per month per team and interest on the amount due the State Bank, that Peterson, should pay to the respondent "one-half the net profits of said teams and outfit less the sum of \$75 per month to be paid to the said Kalberg." Second party, Kalberg, agreed, in consideration of the extension of the time, that "one-half the net profits" earned by the teams, less the sums above

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mentioned, to the extent of \$1,350, should be paid to the respondent. The appellant in this case, under the terms of the contract, agreed that he would work the teams and would pay,

“one-half the net amount that is earned on said job by said teams and outfit less the sum of \$75 per month, to the said first party, not exceeding the sum of \$1,350 and interest from the date of maturity of the claim against said second party, and further agrees that the amounts to be deducted from the earnings of said teams and outfit at the rate of \$3.50 per day per team shall be the keep of said teams, not to exceed, however, \$40 per month per team and interest on the loan of the State Bank of Seattle, which loan shall not exceed the sum of \$18,000; and further agrees that one-half the net profits on said teams and outfit, less the sum of \$75 per month, and not exceeding the sum of \$1,350 and interest, shall be held by said third party until the completion of said contract, but the date of such completion shall not extend beyond the period of five months from the date hereof”

Because of the use of the word “profits” in this contract, the trial court was evidently of the opinion that the contract was ambiguous, and therefore heard oral evidence to determine the real intention of the parties. The court concluded, after hearing the evidence, that the appellant, by the terms of this contract, had agreed to pay to the respondent one-half of the net profits on said teams which was earned by them, less the expenses thereof, not exceeding the sum of \$1,350 and interest, and that this was payable in any event at the expiration of five months from the date of the contract. We are satisfied that the trial court decided correctly upon that question, whether we take the contract as it appears upon its face, or whether it is considered in connection with the evidence in the case. While the contract uses the words “one-half the net profits,” it is plain, we think, that the net profits there referred to is the balance left after deducting the expenses of the teams at \$40 per month per team and the \$75 per month for Kalberg and the interest on the debt due to the State Bank. There is no reference in this contract to any

other contract, and it is not claimed that the respondent signed any other contract. It is true that, on the same day, another contract was entered into between Kalberg & Brandon and the appellant. That contract was one wherein Peterson took over a contract which had theretofore been entered into between the city of Seattle and Kalberg & Brandon as co-partners, wherein it was agreed that the appellant should use the teams of Kalberg & Brandon in performing work under the contract for the city. And it was agreed in that contract that \$8.50 per day should be allowed for each team for each day's work, and that there should be deductions of \$75 per month for Kalberg and interest on the money due the bank; and that the proceeds of the work of these teams should be held by the appellant until the contract was finally completed. And it was,

"Further agreed and understood that if said contract does not make sufficient money to pay the parties for the team work as herein mentioned, that then neither of the parties hereto shall receive any compensation for such team hire except such compensation as they may receive out of the profits of said contract after the payment of all other expenses."

But the respondent testified that he did not know the terms of that contract, and was not interested therein; that he agreed to extend the time of payment of the debt owing to him by Kalberg for five months, in consideration that Peterson would pay one-half of the net profits of the use of the teams upon his contract during that time. In other words, the respondent made it possible for the appellant to use the teams upon the work for that period of time in consideration that the appellant would pay the amount of his claim.

It is argued by the appellant that, because the work under the contract with the city has not yet been completed, therefore the action was prematurely brought. But the contract sued upon by which Peterson agrees to pay provides that the date of such completion of the contract shall not extend be-

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yond the period of five months from the date thereof, which can mean nothing less than that Peterson agreed to pay whatever the net profits of the teams were at that date, notwithstanding the contract with the city had not been completed. The five months period had expired before the action was begun.

We are of the opinion that the contract itself is sufficient to sustain the order of the trial court. If the contract is ambiguous, the evidence in the case leads to the same conclusion. The cause, therefore, was not prematurely brought.

The judgment is affirmed.

CROW, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11410. Department Two. January 8, 1914.]

GEORGE NOLAND *et al.*, *Appellants*, v. FREDERICK J. ARNOLD *et al.*, *Respondents*.¹

TAXATION—FORECLOSURE—SUMMONS — STATUTES — AMENDMENT—
WHAT LAW GOVERNS. Where a service of summons in a tax foreclosure was completed by the last publication on February 13, under Laws 1897, p. 182, § 96, prior to the amendment of 1899, Laws 1899, p. 296, § 13, changing the form of the summons, the validity of the service is to be determined by the earlier act, the amendment having no application.

SAME—SUMMONS—FOR PUBLICATION—FORM. A statement at the foot of a published summons below the attorney's names, giving the dates of the first and last publication, is a part of the summons, the same as though it were contained in the body thereof.

SAME—SUMMONS—FORM—STATUTES. Under Laws 1897, p. 182, § 96, providing that the summons in a tax foreclosure shall contain a direction to the owner summoning him to appear within sixty days after service of the summons, and *Id.*, § 97, providing that the summons shall be served in the same manner as in civil actions, the form of the summons in tax foreclosures is governed by § 96, *supra*, and not by the general statutes, Rem. & Bal. Code, § 233, requiring summons for publication in civil actions to notify the defendant to appear within 60 days after the first publication of the summons.

¹Reported in 137 Pac. 801.

SAME—SUMMONS—FORM. A summons for publication in a tax foreclosure proceeding, giving the dates of the first and last publication, and notifying the owner to appear within sixty days after the service of the summons upon him, sufficiently notifies him to appear within sixty days after the last publication.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 9, 1913, dismissing consolidated actions to quiet title, after a trial on the merits to the court. Affirmed.

McClure & McClure, for appellants.

Corwin S. Shank and *Horatio C. Belt*, for respondents.

PARKER, J.—This controversy first came into the superior court for King county in the form of three separate actions, instituted by the plaintiffs, seeking to quiet their title to different tracts of land claimed by the defendants Arnolds, Chamberlins, and Larsens, separately, under certain tax foreclosure proceedings, which they claimed divested the plaintiffs of title to the land. It appearing that the respective rights of the parties to these actions rested upon controlling facts in substance the same, the actions were, by order of the superior court, consolidated. Thereafter, new pleadings were filed, presenting the question of the superiority of the claim of title made by the plaintiffs as against the defendants, in substance as in the original actions. A trial upon the merits in the superior court resulted in judgment denying the relief prayed for, and a dismissal of the action. From this disposition of the cause the plaintiffs have appealed to this court.

While the contentions of counsel have to do with the question of the validity of the judgments rendered in the tax foreclosure proceedings under which respondents claim title and, also, the question of appellants' laches following those proceedings, we conclude that the record before us calls for affirmance of the judgment upon the ground that the judgments rendered in the tax foreclosure proceedings were valid

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and divested appellants of their title to the land. The facts controlling the disposition of this question are not in dispute.

In January, 1901, and for some years prior thereto, appellants were the owners of all the land here involved, consisting of five lots in the city of Seattle. Appellants having failed to pay the taxes thereon, and J. F. Bleakley having purchased and become the owner of tax certificates of delinquency against the lots, in January, 1901, he commenced five separate tax foreclosure proceedings against appellants upon his certificates of delinquency, in the superior court for King county. Appellants being residents of the state of Oregon, and it not being possible to serve them with summons in the tax foreclosure proceedings within this state, service was had upon them in each of those proceedings by publication in a newspaper published in King county, which publications were made once a week for six consecutive weeks, the first publication being on January 12, 1901, and the last being on February 23, 1901, all of the summonses being exactly alike as to form and contents, apart from the lot descriptions therein. Each of the summonses, as so published, in so far as we need here notice their contents, reads as follows:

“ . . . You are hereby directed and summoned to appear within sixty (60) days after the service of this notice and summons upon you exclusive of the day of service, in the above named court, and defend the action, or pay the amount due . . . J. F. Bleakley, Plaintiff.

Office and Postoffice Address:

By H. H. Eaton,

Stevens Hotel, Seattle,

Attorney for Plaintiff.

King county, Washington.

First publication Jan. 12, 1901; last Feb. 23, 1901.”

In so far as the language of the summonses, in the body thereof, directed appearance by the defendants, these appellants, they complied with the provisions of § 96, p. 182, Laws of 1897, being a portion of the revenue law of the state then in force, reading as follows:

"Such notice shall contain— . . .

"3. A direction to the owner summoning him to appear within sixty days after service of the summons, exclusive of the day of service, and defend the action or pay the amount due."

Section 97 of that law, which was also then in force, provided for the service of summons in tax foreclosure proceedings by reference to the general law relating to service of summons in civil actions, as follows: "Summons shall be served in the same manner as summons in a civil action is served in the superior court." Section 96 of the revenue law was, in some respects, amended by section 13, p. 296, Laws of 1899, but remained unchanged so far as the above quoted provisions are concerned. The general law relating to the manner of service of summons by publication in civil actions, which has been in force since long prior to the commencement of these tax foreclosure proceedings, is found in Rem. & Bal. Code, § 233 (P. C. 81 § 159), and reads as follows, in so far as we are here concerned with its provisions:

"The publication shall be made in a newspaper printed and published in the county where the action is brought . . . once a week for six consecutive weeks: Provided, that publication of summons shall not be had until after the filing of the complaint, and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. The summons must be subscribed by the plaintiff or his attorney or attorneys. The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons . . ."

This action, it will be noticed, relates not only to the manner of service in civil actions, but also to the contents of the summons in such actions. Whether § 97 of the revenue law above quoted makes, by reference, the provisions of Rem. & Bal. Code, § 233 (P. C. 81 § 159), relating to the contents of the summons, controlling in tax foreclosure proceedings,

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in view of its specifically prescribed contents in § 96 of the revenue law, is a question we will notice later. The summonses in these tax foreclosure proceedings, we have noticed, were published the last time on February 23, 1901, so that, on that day, their service was complete and effectual, if they were sufficient in form and statement of their contents. On that day and prior thereto, there was no other law in force in the state of Washington relating to the contents and the service of summons by publication in tax foreclosure proceedings than that above quoted which need be here noticed. Thereafter, on March 20, 1901, there became effectual by virtue of the governor's approval thereof, and by virtue of an emergency clause contained therein, an act of the legislature passed at the session of 1901, amending § 96 of the revenue law of 1897 so as to make the subdivision thereof above quoted to read as follows:

"Such notice shall contain . . .

"A direction to the owner summoning him to appear within sixty days after service of the summons, exclusive of the day of service, and defend the action or pay the amount due, and when service is made by publication a direction to the owner, summoning him to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication, and defend the action or pay the amount due." Laws 1901, p. 384.

Not until the passage of this amendment of 1901, did the revenue law make any specific provision as to the contents of a summons which was to be served by publication in a tax foreclosure proceeding. Thereafter, on April 30, and May 21, 1901, more than sixty days having elapsed since the last publication of the summonses in the tax foreclosure proceedings, the defendants therein, these appellants, being in default for want of appearance and defense therein, the court rendered judgments foreclosing the delinquent tax certificates held by J. F. Bleakley, the plaintiff therein. At the sale of the lots held in pursuance of those foreclosures, Bleakley became the purchaser of the lots, receiving deeds therefor in

due course from the county treasurer. It was through these foreclosures, and mesne conveyances, that appellants Arnolds, Chamberlins and Larsens became the present owners of separate portions of the land here involved. It is important that we keep in mind, as we proceed, the chronology of the events we have narrated; especially in the application of the decisions relied upon by counsel for appellants.

In view of the passage of the amendment of 1901, which became effective, as we have noticed, some twenty-five days after the date of the last publication of the tax foreclosure summonses, let us first inquire what, if any, influence that amendment will probably have in our consideration of the question of the validity of these summonses and their service. A bare statement of the facts, already noticed, would seem to necessarily leave that amendment entirely out of the proper consideration of the question of the validity of those summonses and the service thereof. We are not, however, without expressions from this court indicating that such is the law. In *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536, the tax foreclosure proceedings there drawn in question were sought to be instituted by a published summons the last publication of which was had a few days prior to the amendment of 1901 becoming effective. That summons commanded the defendant "to appear within sixty days after the date of the first publication." It seems to have been prepared with a view to conforming to the general law providing for publication of summons in civil actions, Rem. & Bal. Code, § 233 (P. C. 81 § 159), as to contents in this regard, instead of complying with section 96 of the revenue law of 1897 above quoted, which was then in force, requiring the summons to direct the defendant "to appear within sixty days after the service of the summons." The main question there discussed was: By which law should its validity be tested? The court held that such test must be made by the law in existence at and prior to the date of its last publication, and that, therefore, the summons was void as not complying with the law then

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existing, the amendment of 1901 not having yet become effective. Justice Hadley, speaking for the court, at page 502, observed:

"It will be observed from the statement hereinbefore made that the first publication of the summons was made February 8, 1901. Under the law as it then existed, the summons in a tax case required the defendants to appear within sixty days after service of the summons, exclusive of the day of service. Laws of 1897, p. 182, § 96, subd. 3. There was no specific provision in the revenue law for serving a defendant by publication summons. Section 97 of the above act, however, provided that 'summons shall be served in the same manner as summons in a civil action is served in the superior court.' The above provision undoubtedly authorized a service by publication in the same manner as in other civil actions. The general statute upon that subject is found in § 4878, Bal. Code. [§ 233 Rem. & Bal. Code.] The statute provides for publication of the summons in a newspaper once a week for six consecutive weeks, and that the service shall not be deemed complete until the expiration of the time prescribed for publication. Therefore a defendant cannot be said to be *served* with publication summons until the full time of the six weeks' publication has expired; and, inasmuch as the revenue law of 1897, *supra*, provided that a defendant in a tax foreclosure proceeding should not be required to appear until sixty days after the *service* of the summons, it follows, that under that law, when he was served by publication he was not required to appear until sixty days after the period prescribed for publication had ended, for at the expiration of that period only was he actually served. The summons in the case at bar was issued and published when the above rule was in force as to tax cases, but it required an appearance within sixty days from the date of the first publication. There was no authority in law for such a summons in a tax foreclosure case at that time."

Following some further discussion, the opinion concludes, at page 505, upon this question, as follows:

"It follows that the summons in this case, issued and published as it was under the late law, must be governed by that law. If under the former law the summons did not confer jurisdiction to enter the judgment, the later law did not

vitalize it so as to give it jurisdictional force. The judgment was therefore void, and the court did not err in vacating it."

The decision in *Silverstone v. Totten*, 50 Wash. 447, 97 Pac. 491, is in harmony with these views. In that case, however, the last publication of the summons involved occurred after the taking effect of the amendment of 1901, and therefore the sufficiency of its service could not be tested by the prior law. We conclude that, since the last publication of these summonses occurred before the amendment of 1901 became effective, that their sufficiency, both as to contents and service, must be tested by the law existing at and prior to the date of their last publication, and that the amendment of 1901 is, therefore, of no consequence in this inquiry.

Let us next inquire: Were the words and figures, "first publication Jan. 12, 1901; last, Feb. 23, 1901," following the signature of the plaintiff and his attorney upon each of these summonses, a portion thereof, with the same force and effect as if these words and figures had been inserted in the body of the summons? This inquiry is proper to be made here, since we have held that, even though, under the law before the amendment of 1901, there was no specific provision in the revenue law itself for stating in the summons the dates of its publication, the summons must, nevertheless, under the law then existing, contain information that will enable the defendant named therein to determine with accuracy the limit of time within which he must appear and defend. In *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385, the question was as to the sufficiency of the summons under the amendment of 1901 above quoted, requiring a direction to the defendant in a published summons "to appear within sixty days after the date of the first publication of the summons." The summons in that case stated the date of the publication only by words and figures following the attorney's signature. Disposing of the question of the sufficiency of this as a statement of the date of the first publication, Justice Hadley, speaking for the court, said:

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"Immediately following the attorney's signature to the summons is the following: 'Date of first publication, October 9th, 1902.' Appellants contend that the above words, not being in the body of the summons, are not contained therein, within the meaning of the statute. They also argue that, since the words follow the signature of counsel, it does not appear that they were authorized by the plaintiff in the case; that they may have been placed there by the printer, or by someone else not representing the plaintiff, and by whose act the plaintiff was not bound. The words were, however, in a conspicuous place, and where they must have been seen, if the summons was read. It was the duty of the defendants in the action to presume that the correct date was stated, and to act accordingly. If it afterwards developed that the date was incorrect, the diligence of the defendants would have saved them from any prejudicial consequences. The fact that the words followed the signature of counsel we think is immaterial. They conveyed as much information as if they had preceded the signature, and their location is analogous to that of the postoffice address of counsel, which usually follows the signature upon the summons. In *Wagnitz v. Ritter*, 31 Wash. 343, 71 Pac. 1035, it was held that § 4870, Bal. Code, which contemplates that the postoffice address of the attorney shall be contained in the summons, was sufficiently complied with when such address followed the signature."

We conclude that these words following the signature of the plaintiff and his attorney, showing the dates of the first and last publication of the summons, had the same effect as if contained in the body of the summons.

Now, since we have seen that the amendment of 1901, which was not the law at the date of the last publication of the summonses here involved, does not control the question of their validity as to form and contents, nor the question of the validity of their service; and, since we have seen that they contain a statement of the dates of their first and last publications, we are brought to our principal inquiry; to wit: Did these summonses conform to the law as it existed at and prior to the date of such last publication, so as to confer jurisdiction upon the court in the tax foreclosure proceedings, or

should they, as counsel for appellants now contend, have directed the defendants in the tax proceedings "to appear within sixty days after the date of the first publication," as required by the amendment of 1901 thereafter becoming effective, and as required in a summons by publication in an ordinary civil action, under Rem. & Bal. Code, § 233 (P. C. 81 § 159), above quoted?

The observation above quoted from the decision in *Woodham v. Anderson, supra*, it seems to us, answers this question against the contentions here made in behalf of appellants. We have noticed that § 96 of the revenue law of 1897, prior to the amendment of 1901, specifically provided that the summons shall direct the defendant "to appear within sixty days after the service of the summons." This, manifestly, as pointed out in *Woodham v. Anderson, supra*, requires the defendant to appear within sixty days from the date of the completed service, whatever the manner of the service should be. The reference in § 97 of the revenue law of 1897, above quoted, to the general law for the manner of service of summons by publication, we think, did not control the specific provision of § 96, revenue law of 1897, requiring the summons to direct appearance within sixty days after its service; though the general law, Rem. & Bal. Code, § 233 (P. C. 81 § 159), relating to publication of summons in civil actions requires a different direction as to time of appearance. Counsel's contentions are apparently rested upon this provision of the general law; and their argument seems to overlook the fact that a requirement as to *manner of service* of summons, and a requirement as to *contents of the summons* are two different matters, and that the requirements of one do not necessarily control the other. The commingling of these requirements in § 233 of the general law is apt to lead to confusion unless careful discrimination be exercised. Section 97 of the revenue law then in force made specific provision as to what the summons should state as to the time within which the defendant was required to appear. This provision, we think,

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was then applicable to all summonses in tax foreclosures, whether served personally or by publication, and was not in any wise controlled by the provisions of § 233 of the general law, though that law was to be looked to to determine the manner of service by publication, which, however, was another matter. This, apparently, was the view entertained by the court in *Woodham v. Anderson*, *supra*, as evidenced by the observations above quoted therefrom. We are of the opinion that, as the law existed at and prior to the date of the last publication of these summonses, when their service was completed, they contained directions for the defendants' appearance, strictly conforming to the law then in existence, and that, by virtue of the statements therein of the dates of their first and last publication, they informed the defendants with absolute certainty as to the time within which they were required to appear and defend. Sixty days after the service of those summonses clearly meant, as shown upon their face, that the defendants had sixty days after the date of their last publication, which, as we have seen, was the date of their completed service.

It is strenuously argued by counsel for appellants that a number of our decisions are in conflict with the views we have here expressed. We do not think so. A critical reading of the decisions of this court touching the sufficiency of summonses in a tax foreclosure proceeding, as to contents and service, will, we think, render it quite plain that no summons like those here involved has ever been the subject of consideration by this court. At the risk of being somewhat tedious, and of making this opinion unduly lengthy, we will now notice in order all of the decisions of this court which could possibly have any bearing upon the question here involved, from the viewpoint of counsel for appellant.

In *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, there was drawn in question the sufficiency of a summons attempted to be served by publication, the last publication of which occurred March 30, 1901, some ten days after the

amendment of 1901 became effective. That summons was, in form, as provided by the revenue law of 1897, and directed the defendant "to appear within sixty days after the service of this summons upon you." While the first publication was before the amendment of 1901 became effective, the last occurred thereafter. Of course, as we have seen, its sufficiency could not be controlled by the prior law since its service had not become complete before the expiration of the force of that law, and not complying with the amendment of 1901, it was held void. In that opinion, the court inadvertently discussed the question before it as though the summons had been issued and published after the amendment of 1901 became effective, as was later pointed out in *Smith v. White*, 32 Wash. 414, 73 Pac. 480, which was the next decision rendered by this court upon the subject of the sufficiency of a summons in a tax foreclosure proceeding and the sufficiency of service thereof. In that decision, the summons involved was also issued in form as provided by the former law, and its publication was not completed until after the amendment of 1901 became effective, and the summons was held void for substantially the same reason.

In *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536, from which we have already quoted, while the summons involved was issued and first published before the amendment of 1901 became effective, it was, in form, as provided by that amendment, and by the general law, § 233, Rem. & Bal. Code, ignoring the provisions of § 96 of the revenue law, in force at the time of its issuance and last publication, requiring the appearance of the defendant "within sixty days after service of the summons." The summons was held invalid because it did not conform to the law in existence at the time of and prior to its last publication.

In *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385, already noticed and quoted from, the summons involved was issued and published after the amendment of 1901 became ef-

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fective. This decision furnishes no aid here further than already noticed.

In *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640, the summons involved failed to become effective because it did not state the date of its last publication. It was issued and published before the amendment of 1901 became effective, and hence failed to inform defendant of the date of its completed service so as to enable him to determine the time within which he was required to appear.

In *Young v. Droz*, 38 Wash. 648, 80 Pac. 810, there was involved a summons issued and published after the amendment of 1901 became effective. It was, in form, so far as its direction to the defendant to appear is concerned, as provided by the revenue law before the amendment of 1901 became effective, and for that reason was held void.

In *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606, there was involved a summons apparently issued and published under the law of 1901, which did not conform to that law in its direction to the defendant to appear.

In *McLean v. Lester*, 48 Wash. 213, 93 Pac. 208, the summons involved was issued and published under the law of 1901. It was held void because of the omission of the year in stating the month and day of its first publication.

In *Bauer v. Widholm*, 49 Wash. 310, 95 Pac. 277, there was involved a summons issued and published prior to the going into effect of the amendment of 1901. It was held void because it contained no statement of the date of its last publication, so, of course, the defendant was not informed of the period within which he was required to appear and defend.

In *Silverstone v. Totten*, 50 Wash. 447, 97 Pac. 491, which we have already noticed, there was involved a summons issued before the amendment of 1901 became effective, but the last publication of which was thereafter. It was held ineffective to confer jurisdiction upon the court in that it did not com-

ply with the amendment of 1901, which was in force at the date of its last publication.

In *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886, the summons involved was held, or rather assumed, to be void. The decision does not inform us upon what ground, evidently because it was a matter which did not call for serious discussion in that case.

In *Gould v. White*, 54 Wash. 394, 103 Pac. 460, there was involved a summons which was held void without discussion, the principal contentions apparently being upon other questions. The court seems to have had in mind the act of 1901, while the form of the summons was as provided by the prior law.

In *Hembree v. McFarland*, 55 Wash. 605, 104 Pac. 837, there was involved a summons which was apparently issued and first published before the amendment of 1901 became effective, the last publication of which was thereafter. Apparently the summons did not conform to the amendment of 1901 though the reasons for holding it invalid are not clear, evidently because that was not a question of serious controversy in the case.

In *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119, there was involved a summons which seems to have been assumed, rather than directly held, to be void. Here also the question does not appear to have been seriously in controversy.

In *Thompson v. Schoner*, 58 Wash. 642, 109 Pac. 116, there was involved a summons which required the defendant to appear, using the language of the law in existence prior to the amendment of 1901. It was held void for reasons which are not clear from the language of the opinion, unless we assume that it failed to state the dates of its publication. The language of the opinion, however, indicates that it was conceded to be insufficient to confer jurisdiction.

No other decision of this court has come to our notice touching the questions here involved, and we think there is none in conflict with the view we here express, that the sum-

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Statement of Case.

monses in these tax foreclosures, conforming, as they strictly do, in their direction to the defendants to appear, to the revenue law existing at and prior to the time of their last publication and stating the dates of their last publication, were sufficient, upon the completion of their service thus made, to confer upon the court jurisdiction to render the judgments in the tax foreclosure proceedings. We note that some of the syllabi to the decisions we have reviewed refer to the revenue law of 1897 without qualification, when, in some instances at least, they evidently mean the revenue law of 1897 as amended by the act of 1901.

The judgment is affirmed.

Crow, C. J., MORRIS, and MOUNT, JJ., concur.

[No. 11813. Department Two. January 10, 1914.]

JAMES TESTERA *et al.*, *Appellants*, v. B. RICHARDSON *et al.*,
Respondents.¹

USURY—WHAT CONSTITUTES. The payment of a fee of five dollars, to an agent negotiating a loan to take up a prior note and chattel mortgage, does not make the loan usurious, under Rem. & Bal. Code, § 6251, where the fee was paid for the agent's services in making an examination of the property and county records, preparing and securing acknowledgment of the new mortgage and filing a release of the prior mortgage, and the court found that the fee was a reasonable charge for the services and not a commission for making the loan.

Appeal from a judgment of the superior court for King county, Smith, J., entered February 8, 1913, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a chattel mortgage. Affirmed.

Herbert E. Snook, for appellants.

W. W. Felger, for respondents.

¹Reported in 127 Pac. 998.

MOUNT, J.—The respondent B. Richardson was proceeding by notice and sale to foreclose a chattel mortgage to satisfy a note executed by the appellants.

The appellants thereupon transferred the proceedings to the superior court for the purpose of contesting the amount claimed to be due upon the note on the ground of usury. The trial court concluded that the note was not usurious, and entered a decree of foreclosure. This appeal is prosecuted from that decree.

The appellants maintain that the note was usurious. This is the only question presented. It appears that the appellants in October, 1910, borrowed the sum of \$65 from the respondent B. Richardson. The respondent was acting through her agent, J. W. Richardson. In applying for the loan, the appellants offered as security a chattel mortgage upon a piano. Before accepting the security, J. W. Richardson desired to see the piano and to make an examination and appraisal thereof; and also desired that the county records should be examined as to the title to the piano. It was also necessary to prepare a mortgage and have the same acknowledged. It was also necessary to obtain a release from a prior mortgage upon the piano. J. W. Richardson agreed to perform these services for \$5, which the appellants agreed to and did pay. The note for \$65, for which the security was given, bore interest at the rate of 12 per cent per annum.

It is argued by the appellants that because this \$5 was paid to J. W. Richardson, the note was thereby made usurious under the statute, Rem. & Bal. Code, § 6251 (P. C. 263 § 3). The appellants rely upon the case of *Ridgway v. Davenport*, 37 Wash. 184, 79 Pac. 606. In that case the statute is quoted in full. We there held that, where a broker loans money of the principal and deducts a sum by way of commissions in excess of the legal interest, that the note is thereby made usurious under the statute. But in this case there was no deduction for commissions for making the loan. The \$5 paid by the appellants to J. W. Richardson was paid

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for his services in examining the piano, in examining the county records, in preparing the note and mortgage, and for the notary's fee for taking the acknowledgment of the same, and for filing a release of a prior mortgage. In order to accomplish these results, it was necessary to expend some time and money in traveling from place to place. The trial court found that these services were rendered to the appellants at their request; that the fee charged therefor was reasonable and not a commission for making the loan; and for that reason held that the payment thereof did not make the note usurious. We are satisfied that this ruling was correct, and that the case of *Ridgway v. Davenport, supra*, does not control in this case.

If the money paid by the appellants to J. W. Richardson could be held to be unreasonable or in the nature of a commission for making the loan, the case of *Ridgway v. Davenport, supra*, would control. But we are satisfied, and the court found, that the services performed were performed for the appellants and were reasonably worth the amount which the appellants agreed to and did pay, and the money paid was not for a commission.

The judgment is therefore affirmed.

Crow, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11450. Department One. January 15, 1914.]

HOLT MANUFACTURING COMPANY, *Appellant*, v.

GEORGE STRACHAN *et al.*, *Respondents*

and Cross-Appellants.¹

SALES—BREACH OF WARRANTY—RESCISSION—DAMAGES. Purchasers of a combined harvester and threshing machine, upon rescinding the sale, cannot recover damages for loss of crops and expenses incurred in attempting to harvest their crops.

ELECTION OF REMEDIES—CONCLUSIVENESS. A definite election of one of two inconsistent remedies, by a party cognizant of the material facts is conclusive, and bars recovery on the alternative remedy.

APPEAL—REVIEW—HARMLESS ERROR. In an action for the price of a combined harvester and threshing machine, defendants' election at the first trial to keep the machine and recover damages, does not necessarily make it reversible error to allow, at the second trial, an answer setting up a rescission, where on the undisputed facts, there was either a settlement or a rescission, and the court by reducing the verdict held the defendants to the theory of a rescission.

SALES—RESCISSION—RETURN OF CONSIDERATION—STATU QVO. Where, upon the sale of a combined harvester and threshing machine, the purchasers were allowed a credit of \$800 for a half interest in machines previously sold, and which machines remained in their possession, they cannot, on rescinding the sale, recover \$800 as though a payment in money had been made; since the vendor is entitled to be placed in *statu quo*, and the vendees' possession of the old machines is a sufficient return of the consideration and satisfies the law.

Cross-appeals from a judgment of the superior court for Whitman county, McCroskey, J., entered February 28, 1913, upon the verdict of a jury rendered in favor of the defendants, in an action on promissory notes. Modified.

Samuel P. Weaver, and *J. M. McCroskey*, for appellant.

Milan Still, for respondents and cross-appellants.

¹Reported in 137 Pac. 1006.

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Opinion Per CHADWICK, J.

CHADWICK, J.—Plaintiff and defendants had certain transactions running over a period of years, during which time two combined harvester and threshing machines were sold by plaintiff to defendants and for which notes were given. In June, 1911, plaintiff sold to defendants another combined machine for the sum of \$3,575. For this, several notes were given, and \$800 was credited upon the purchase price, and for which plaintiff took a one-half interest in the two machines previously sold. The last machine was returned in the fall of 1911, plaintiff says under an agreement and settlement, and defendants say because they were ordered by plaintiff so to do. Plaintiff brought this action to recover upon certain notes made in previous years, and for \$750 which it says defendants were to pay on the settlement for the use and wear of the machine during the season of 1911, and for \$106 alleged to be due for extras, supplies, etc.

Two trials have been had in the lower court. The case was first tried on the third amended answer. The trial judge held that, by their answer, the defendants had elected to keep the machine, and might recover the damages suffered while attempting to use it. A verdict was returned in favor of the plaintiff; a new trial was granted on grounds not now material, whereupon, and over the protest and objection of plaintiff, defendants were allowed to file a fourth amended answer. The trial court construed this answer to be a plea of rescission, and instructed the jury that the measure of defendants' recovery was the amount paid upon the purchase price. The jury returned a verdict for \$3,775 in favor of the defendants. On motion for a new trial, the court made the alternative order that, unless defendants remitted all of their judgment in excess of \$800, a new trial should be had. Defendants filed a written remission of their judgment, and plaintiff has appealed.

Many errors are assigned, most of them growing out of the confused record and manner of making up the issues. As we view the case, we think it unnecessary to discuss all of

these assignments. Like the trial judge, we believe that there was probably enough evidence submitted to the jury to warrant it in finding that all the debts due and owing from the defendants to the plaintiff were paid. The court, by reducing the damages, held, in effect, that defendants could not rescind and at the same time recover damages for loss of crops and expenses incurred in a futile attempt to harvest their crops with the rejected machine. In so holding the court followed the settled law in this state. *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925; *Blake-Rutherford Farms Co. v. Holt Mfg. Co.*, 70 Wash. 192, 126 Pac. 418; *Thompson v. Rhodehamel*, 71 Wash. 24, 127 Pac. 572.

It is most strenuously insisted by counsel for plaintiff that the case should be sent back for a new trial, because the trial judge abused his discretion in permitting defendants to file a fourth amended answer setting up a claim of damages which is inconsistent with the remedy claimed in their third amended complaint.

The general rule is that a first pronounced election is final and imperative.

"It is certainly the established law, in every state that has spoken on the subject, that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy." 7 Ency. Plead. & Prac. 364.

See, also, 15 Cyc. 262; *Babcock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713; *Gaffney v. McGrath*, 23 Wash. 476, 63 Pac. 520; *Houser & Haines Mfg. Co. v. McKay*, *Blake-Rutherford Farms Co. v. Holt Mfg. Co.*, and *Thompson v. Rhodehamel*, *supra*.

This rule would ordinarily be applied, but we find the state of the record to be such that we are not called upon to do it. Under the undisputed facts of the case, there was either a settlement or a rescission. The court, by reducing the verdict

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to the extent that he did, held defendants to the theory of rescission. These things, coupled with the fact that the machine is not now, and was not at the time of the first trial, in the possession of the defendants, but had been returned at the solicitation of the plaintiff and with the acquiescence of the defendants, makes it seem clear to us that it would work injustice to all parties concerned to return the case for a new trial upon a theory of law that cannot possibly fit any of the existing facts. The trial judge was of the opinion that, while it was his duty to cut off all the affirmative judgment, plaintiff was nevertheless answerable for \$800, the credited value of the half interest in the two old machines. The court held this to be a payment which defendants might recover under the authority of the *Houser & Haines Mfg. Co. v. McKay* decision. This \$800 was not actually paid in money. It was allowed as a credit when the 1911 machine was purchased. The very essence of a rescission is that the parties are placed in *statu quo*. *Reidt v. Smith*, 75 Wash. 365, 184 Pac. 1057. The reason why one rescinding a trade cannot recover more than the amount paid is that he elects to swap back; he must put the other party where he found him.

There is nothing in the record to indicate that plaintiff would have taken the half interest in the old machines if it had understood that it was to be obligated at that time or at some future time to pay for that interest in money. In rescinding the purchase, defendants are bound to place plaintiff in the same situation it would have been had no trade been made. The rule has been laid down in this state and it is consistent with the rule as declared in all the books.

"The law is that a party cannot ratify one part of a contract or transaction, which is beneficial to his interests, and disaffirm as to the remainder; that if he elects to rescind, he must do so *in toto*. . . . He must either elect to affirm the contract, and defend because of its breach, or rescind the same *in toto*." *Seattle Nat. Bank v. Powles*, 33 Wash. 21, 73 Pac. 887.

In other words, if defendants compel plaintiff to take back the 1911 machine, or if they acquiesce in the taking of it back, they thereby absolve the plaintiff of all liability growing out of the original transaction. The machines, if the credit be called a payment, are in defendants' hands, and the possession of the specific property is a sufficient return of the consideration and satisfies the law. It is only where a payment is made in money, or where the specific thing cannot be returned, that a judgment for money can be claimed upon rescission.

With this correction we believe that the judgment of the lower court is as nearly consistent with the true merit of the case as it is possible for any court to arrive at. Therefore, without discussing the record or the many assignments of error, we have concluded to remand the case with instructions to the lower court to set aside the verdict in so far as it finds for the defendants in any sum, and that no judgment other than a judgment for costs be entered in their favor. The plaintiff will recover its costs in this court.

Crow, C. J., Gose, Ellis, and Main, JJ., concur.

[No. 11181. Department One. January 17, 1914.]

GOLD RIDGE MINING AND DEVELOPMENT COMPANY,
Respondent, v. H. J. RICE, *Appellant*.¹

APPEAL—PRESERVATION OF GROUNDS—WAIVER OF OBJECTIONS—PLEADING. Objection that a counterclaim was not pleaded is not available on appeal, where the evidence was admitted without objection, since the issues became as broad as the evidence.

CONTRACTS—CONSTRUCTION. An agreement that the defendant might draw against the proceeds of the sale of his stock, sold for him by the plaintiff, is not affected by the fact that part of the proceeds is represented by the purchaser's promissory note, where plaintiff had pledged the note as collateral and claimed to own it.

¹Reported in 137 Pac. 1001.

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Opinion Per Gose, J.

CORPORATIONS—STOCK—SUBSCRIPTIONS—PAYMENT IN PROPERTY—CONSIDERATION. A sale to a mining corporation, by two of its trustees, of a bond upon a group of mining claims, in full consideration of their stock subscriptions, unanimously agreed to by the trustees, is valid as between the parties, where no rights of creditors are involved, the deal was in the open, and no one was wronged.

CORPORATIONS—STOCK—SALE—VALIDITY—ESTOPPEL. A corporation receiving and holding the proceeds of the sale of its stock cannot assert that the sale was not binding upon it.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 26, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

N. C. Bardsley and *Fred H. Witt*, for appellant.

Willis E. Reed, *M. O. Reed*, and *Robertson & Miller*, for respondent.

GOSE, J.—This action was brought to recover \$1,663.59 from the defendant, which it is alleged he drew from the bank account of the plaintiff in excess of the amount due him for his services as its general manager. The answer is in effect a general denial. The court found that the defendant had drawn from the plaintiff's bank account \$1,030.29 in excess of the amount due him, and entered a judgment against him for that amount, with interest and costs of suit. The defendant has appealed.

The appellant asserts a counterclaim of \$1,500, the proceeds of 7,000 shares of his stock which were sold by the respondent's secretary and treasurer with the consent of the appellant and retained by the respondent under an agreement that the plaintiff could draw against it. The respondent meets this claim in four ways; (a) that the counterclaim is not pleaded; (b) that the appellant paid nothing for his stock; (c) that the sale of the stock to the extent of \$1,000 is represented by a note which has not been paid, and

(d) that the sale of appellant's stock is not binding upon respondent.

In respect to the contention that the counterclaim is not pleaded, it is sufficient to say that the evidence was admitted without objection, and, under the uniform decisions of this court, the issues became as broad as the evidence.

Upon the third contention, that \$1,000 of the stock is represented by an unpaid note, the evidence shows, that the note was drawn in favor of the respondent, that it was using it as collateral at the time of the trial, and that it claims to own it.

The principal contention is that the appellant paid nothing for the stock, and hence that he was not entitled to the proceeds of the 7,000 shares which represent the \$1,500. This was the view taken by the trial court. The facts in brief are these: The appellant held a bond upon the "Wonder" group of mining claims, situate in the Ten Mile mining district, in Idaho county, in the state of Idaho. One A. A. Hammer, although not named in the bond, appears to have had some interest with the appellant. The appellant, Hammer, and one Stone organized the respondent corporation. They were its first trustees. The appellant was elected president and general manager, and continued in that capacity until January 22, 1912. Hammer was elected its secretary and treasurer, and held these offices at the time of the trial. The minute book of the respondent shows that Hammer made a written offer to the respondent to assign the bond to it for 200,000 shares of its capital stock, 100,000 to himself and 100,000 to appellant, its capital stock being 300,000 shares, the respondent "to assume and carry out all the terms of said bond . . . and that said bond be taken in full payment of the subscription of said Hammer and Rice." The minute book shows that the respondent "unanimously accepted" the proposal, and directed the secretary to issue the stock upon the assignment of the bond. The bond was assigned and later duly filed for record. The rights of

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creditors are not involved. The appellant and Hammer were upon both sides of the bargain. The respondent was also represented by its third trustee. No one was wronged and no rule of public policy was violated. The holders of the bond knew what they were selling, and the respondent knew precisely what it was buying. The deal was made in the open, and the transaction was valid as between the parties. *Inland Nursery and Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499; *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U. S. 206; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

It is further suggested that the sale of the appellant's stock is not binding upon the respondent. It suffices to say that it received, and still holds, the proceeds of the sale. *Harvey v. Sparks Brothers*, 45 Wash. 578, 88 Pac. 1108.

The respondent received the proceeds from the sale of the appellant's stock on the third day of January, 1911. The appellant is entitled to a judgment against the respondent for \$1,500, with interest from the third day of January, 1911, at the legal rate, less \$1,030.29, with legal interest from the 22d day of January, 1912. The judgment is reversed, with directions to enter a judgment in harmony with this opinion.

Crow, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11291. Department One. January 17, 1914.]

P. V. PRESENTIN, *as Marblemount Mercantile Company,*
Respondent, v. HAWKEYE TIMBER COMPANY, *Appellant*.¹

FRAUDS, STATUTE OF—AGREEMENT TO PAY DEBT OF ANOTHER—DIRECT OR COLLATERAL PROMISE—EVIDENCE—SUFFICIENCY. A promise is shown to be a collateral one, and within the statute of frauds, Rem. & Bal. Code, § 5289, relating to a special promise to answer for the debt of another, where it appears that plaintiff, on selling and delivering certain goods delivered to one N, to whom the promise was made, could not give a clear and consistent statement of the transaction, testifying that defendant told him to deliver the goods to N, and "the account would be taken care of;" to "go ahead and sell and we will see you get the money;" and "that is all he said, for me to furnish N the stuff and they would pay the bill," and that they would "take care of the account;" especially where the parties, in their correspondence, treated it as N's account; since every statement except the third is clearly collateral.

Appeal from a judgment of the superior court for Skagit county, Houser, J., entered January 30, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

Winfield R. Smith, for appellant.

Hurd & Hilen, for respondent.

GOSE, J.—This is a suit to recover a balance alleged to be due on an open account for goods, wares, and merchandise. It is alleged that the goods were sold in Skagit county, in this state, to the Hawkeye Timber Company, a corporation organized and existing under the laws of the state of Iowa, and doing business in this state; that the Iowa corporation, in December, 1911, disincorporated; that its stockholders organized the defendant corporation under the laws of this state, under the same name, with the same stockholders, the same officers, the same assets as the old corporation; that the Washington corporation is the same business

¹Reported in 137 Pac. 999.

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entity, and that it assumed all the debts and liabilities of its predecessor. The defendant joined issue on the alleged sale to its predecessor. The case was tried to the court, resulting in a judgment for the plaintiff. The defendant has appealed.

The facts in brief are these: In December, 1909, and for nearly two years thereafter, the Iowa corporation was operating a shingle mill in Skagit county. On the date stated, one Norlin contracted to deliver it shingle bolts at a fixed price per cord. The goods in controversy were delivered to Norlin. The respondent claims that the Iowa corporation, through its local superintendent, promised to pay for the goods. This the appellant denies.

The respondent testified that the superintendent of the Iowa company told him to deliver the goods to Norlin, and that "the account would be taken care of." He also said that the superintendent told him: "If you make right prices, to go ahead and sell him; that we will see you get the money." Following this he said: "That is all he said; for me to furnish Norlin with the stuff and they would pay the bill." After the respondent had closed his case, he was recalled for further cross-examination, and was asked:

"Question: That is not in reference to a talk you now say you and he had in December, 1909, before this account with Norlin began? Answer: He simply told me to let Norlin have the stuff and they would take care of the account."

From December, 1909, until August 29, 1910, the company paid for the goods purchased by and delivered to Norlin. The accounts were sent direct to the company. The charges were made to the company by Norlin. On the date last mentioned, the company wrote the respondent as follows:

"We are inclosing check for \$126 covering orders forwarded by you. In future instead of sending *Ed Norlin's bills* to this office, hand the bill to him and he will give you an order for the full amount." [The italics are ours.]

Thereafter, and until about July, 1911, the company paid Norlin's orders drawn upon it in favor of the respondent. It refused to honor his orders for goods delivered during the months of July and August, 1911, because Norlin was overdrawn.

The respondent's several versions of the promise bring the case within the statute of frauds. "Every special promise to answer for the debt, default or misdoings of another person" shall be void unless the contract or promise is in writing. Rem. & Bal. Code, § 5289 (P. C. 203 § 3). Every statement of the promise except the third is clearly collateral. The case is controlled by *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913 D. 849. In that case, an appeal was taken from a judgment entered upon a demurrer to the complaint. The complaint alleged that the defendant promised to "pay," "become responsible for," and "indemnify and hold [the appellant] harmless." This was held to fall within the ban of the statute, the court saying:

"Viewing the complaint as an entirety, without selecting particular words or phrases and giving them undue weight, prominence, or emphasis, we are of the opinion that the alleged promise offends the statute."

If the Iowa corporation directed the respondent to furnish Norlin with goods and expressly promised to pay for them, the respondent should have been able to make a clear and consistent statement of the transaction. This he seemed unable to do, or at least failed to do. In three statements, he made the promise collateral and within the statute; in one he made it direct and without the statute.

In *Skinner v. Conant*, 2 Vt. 453, 21 Am. Rep. 554, an agreement "to see Conant paid if Andrus hired him," was held to be collateral. In *Wagner v. Hallack*, 3 Colo. 176, 34 Am. Rep. 76, it was held that the promise: "We will see the article paid for," or equivalent words, imports a collateral undertaking and falls within the ban of the statute. In

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Swigart v. Gentert, 63 Neb. 157, 88 N. W. 159, a promise "that he would see that the plaintiff received his pay" was held to be collateral. In that case the court said: "But the promise to see the debt of another paid although it is the basis of extending credit is still within the statute of frauds." A promise to "pay or see that I had my pay" was held to offend against the statute. *Haverly v. Mercur*, 78 Pa. St. 257.

The respondent cites *Davies v. Carey*, 72 Wash. 587, 180 Pac. 1137. In that case there was a direct promise to pay the vendor for the goods. The respondent also cites a line of cases where the vendee had promised the vendor to pay a given sum of money to a third party as a part of the purchase price of the subject-matter of the transaction. These cases are clearly distinguishable. In such cases the vendee merely promised to pay his own debt.

The respondent also suggests that the account was carried on his books against the Hawkeye Timber Company. He admits, however, that the appellant had no notice of this fact. The record, taken as a whole, shows that the appellant treated the sales as having been made to Norlin. This view is made prominent by the letter of August 29, 1910, in which the account is referred to as Norlin's account.

We think the promise was a collateral one and within the statute. The judgment is therefore reversed, with directions to dismiss.

CROW, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11302. Department One. January 17, 1914.]

MILAN ZIZICH, *Respondent*, v. HOLMAN SECURITY
INVESTMENT COMPANY, *Appellant*.¹

AGRICULTURE — LABORER'S LIENS — FORECLOSURE — CONTRACT — PERFORMANCE OR BREACH — EVIDENCE — SUFFICIENCY. The evidence is insufficient to sustain findings that laborers' contracts to clear land had been fully performed and that they quit work because ordered to do so, where, by the preponderance of the evidence, it appears that the work had not been properly performed, being merely slashing and only about fifty per cent of the work of clearing it; that eighty per cent of the contract price allowed them was a very liberal allowance, and that they quit because they had become dissatisfied with the allowance made.

VENDOR AND PURCHASER — CONTRACT — PERFORMANCE OR BREACH — TITLE. Where laborers were to be paid for clearing in part by conveyance of lots, they cannot, before completion of the contract and earning their deeds, quit and claim the full compensation in cash, because of defects in title to the lots; since the vendor may be able to convey title when the time for performance arrives.

APPEAL — REVIEW — FINDINGS. Upon a trial *de novo*, under Rem. & Bal. Code, § 1736, where findings are not sustained by a preponderance of the evidence, they will be reversed on appeal.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered October 25, 1912, upon findings in favor of the plaintiff, in an action to foreclose a laborer's lien. Reversed.

Tom W. Holman, for appellant.

Walter B. Allen and *U. D. Gnagey*, for respondent.

GOSE, J.—This is an action to foreclose a laborer's lien. The case was tried to the court. There was a judgment for plaintiff. The defendant has appealed.

The complaint alleges that, about the first day of January, 1911, the plaintiff and his five assignors began working for the defendant; that the work consisted in the clearing of certain lands, at an agreed price of \$30 per acre, one-half

¹Reported in 137 Pac. 1028; 139 Pac. 57.

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to be paid in cash and the remainder to be applied upon the purchase price of six lots in the town of Irondale, each of the parties purchasing one lot at an agreed price of \$250 per lot; that, under the terms of the contracts, each of the parties became entitled to a deed to his respective lot when the six had cleared one hundred acres of land; that the respondent and his assignors worked from about the first of January, 1911, until about the first day of June following; that they cleared 115 acres, and were paid in cash the sum of \$1,056.83, leaving a balance of \$2,393.67; that the respondent and his assignors thereupon demanded good and sufficient deeds to the lots embraced in their respective contracts, and payment for the balance due them; and that the appellant had not at that time, nor has it now, a clear title to the lots. The complaint also alleges, that the respondent and his assignors, in due time, filed a notice of a claim of lien upon the land upon which the clearing was done, and that five of the six lien claimants had assigned their claims of lien to the respondent. The appellant answered, alleging that it had paid the respondent and his assignors \$935.89 in cash; that it had credited them on their respective contracts in the aggregate \$1,199.51, and alleged that they had cleared 71.12 acres and no more.

The court found that the respondent and his assignors had cleared 74.53 acres; that they had been paid \$935.89 in cash, and that there was due them on June 1, 1911, a balance of \$1,300. The court also found "that the plaintiff and his assignors continued to work for the defendant under said contracts until on or about June 1, 1911, when they were informed by the defendant that there was no more land to be cleared and that they should quit." The court further found that the appellant's title to the land was defective, and therefore concluded that it had breached its contract in two respects, (a) in requiring the respondent and his assignors to quit, and (b) in that the title to the land which it had agreed to convey to them was defective. These findings and

conclusions were made effective by the decree. A decree was entered in favor of the respondent for \$1,300, with interest and attorney's fees, and a lien was established against certain lands of the appellant and foreclosure and sale were directed.

The contract with the respondent and each of his assignors provides:

"The purchaser is to do *clearing work* for this company at the rate of \$30 per acre, \$15 per acre to apply as a credit on this contract. In addition to this \$15 per acre, there will be deducted on the first settlement made for clearing done [about February 10, 1911] five dollars per acre cleared at that time in lieu of cash payment by the purchaser, and \$2.50 per acre will be deducted on each acre cleared thereafter until \$40 has been paid as the initial payment."

This provision in the several contracts accounts for the discrepancy between the cash payment and the property credits allowed by the appellant. There is a difference of 3.42 acres between the amount of clearing conceded by the appellant and the amount found by the court. In other words, the court found that the respondent and his assignors had cleared 3.42 acres more than the appellant concedes. The land had been logged about 1890, and the clearing consisted in cutting the young growth.

A reading of the testimony makes it clear that the appellant has conceded to the respondent and his assignors a larger credit for clearing than they were entitled to. The testimony shows that they were to clear the land, cut the growth within six inches of the ground, and fall the small timber so that it would all lie in the same general direction, and so as to give it harmony with other clearing which the appellant was having done at the same time by other contractors. The testimony of disinterested witnesses makes it clear that they did not do the "clearing work" in the manner contemplated by their contract, but as one of the witnesses puts it, that they did it "in a careless and improper manner;" that their work was "slashing of a rough sort,"

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not "clearing at all;" that they left stumps varying in height from 13½ inches to 43 inches; that as another witness puts it, the ground was "roughly slashed;" that as another witness states, the slashing was "crude and unworkmanlike" and not "clearing in any sense of the word." Another witness says that "they did only slashing work, and it was not well done." Another witness, Mr. William Bishop, testified, that he had had twenty-five years' experience in clearing, that he had gone over their work, and that it was "the roughest slashing," not "cleared at all," and that they had done about sixty per cent of the contract work. Other disinterested witnesses testified that the work they had done was worth from twelve to fifteen dollars per acre. The appellant settled with them for this slashing from time to time on the theory that they had done eighty per cent of the work; that is, it allowed them eighty per cent of the contract price, based upon acres. Under the overwhelming testimony, this allowance was exceedingly liberal.

As we have observed, the court found that the appellant directed the respondent and his assignors to quit. Under the findings of the court, they still owed \$200 upon the land and were not then entitled to deeds unless they had been directed to quit. The finding is not within the issues, nor is it supported by the preponderance of the testimony. There is no suggestion in the complaint that the respondent or his assignors were directed to quit. On the other hand, the complaint is drawn upon the theory that they had performed their contract, that they had demanded deeds, and that the appellant's title to the land was defective. The respondent testified that, about June 1, "the force" in charge of the appellant's work told them that the appellant had no more land to clear, and that "we would have to quit." He further testified upon cross-examination, "that all quit in June, 1911; that we quit in June, 1911. J. P. Holman, who had taken charge after Mr. Oliphant left, would not pay us the amount of the acreage we had gone over." One of the plain-

tiff's assignors testified: "We started to work on the defendant's land in January, 1911, . . . We quit in June, 1911." He further said that "we quit finally because J. P. Holman, who had taken charge of the work after Oliphant quit, would not give us pay for the amount of land we cleared." Another of the respondent's assignors testified in rebuttal "that Mr. Holman ordered us to quit, and go to Seattle to get our money." This is all the testimony offered by the respondent which tends to show their reasons for quitting the work on June 1st. Mr. Holman, who was in charge of the work, testified that he did not direct them to quit, but that they quit because they became dissatisfied with the percentage basis which he was allowing them for their slashing. After they had quit, and on June 6, 1911, counsel for the respondent and his assignors wrote the appellant as follows:

"The Austrian laborers insist that they have cleared more acres than shown by your statement, and they are very insistent upon an early settlement. I shall have some one go up to Irondale and measure the land tomorrow or next day, and I wish you would have your surveyor do the same again right away so the matter may be closed. They claim they want to go out to work and will not do so until this is settled."

The appellant's version that they quit voluntarily because they claimed that they were not being paid for all the clearing is corroborated by the silence of the complaint upon this question, by the letter of their counsel, and by all the attending circumstances. There was still clearing to be done. The ground which they had slashed still required much work to clear it within the meaning of the contract.

The trial court concluded, as a matter of law, that the appellant's title to the land which it had agreed to convey to the respondent and his assignors was not a marketable title, and hence that the parties were entitled to a lien. The question of title is not before us. The lots have not been fully paid for. The appellant will have fulfilled its obligation if

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it is able to convey title when the time for performance arrives. *Morris v. Columbia Canal Co.*, 75 Wash. 483, 135 Pac. 238.

Our conclusion is that the respondent and his assignors, at the time of the commencement of the action, had been paid in full for their work in money and credits upon their several contracts; that the contracts were breached by the respondent and his assignors, and not by the appellant, and that the respondent has failed to sustain his cause of action by a preponderance of the testimony.

The case was tried in January, 1912. The findings were not signed until October following. A reading of the testimony has persuaded us that, during this interval, some of the testimony in the case must have escaped the attention of the trial judge.

The statute, Rem. & Bal. Code, § 1736 (P. C. 81 § 1225), puts the burden upon this court of trying the case *de novo* in actions legal or equitable tried to the court. In the discharge of this duty, we treat the findings of the trial judge with great respect; but if, upon an examination of the evidence, we become convinced that a preponderance of the testimony is against the findings of the trial judge, it becomes our duty to make our own view effective. *Lewis v. Dean*, 76 Wash. 596, 137 Pac. 341; *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172.

The judgment is reversed, with directions to dismiss the action.

CROW, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

ON PETITION FOR REHEARING.

[*En Banc*. February 28, 1914.]

GOSE, J.—In the opinion in this case, we said that the finding, that the respondent and his assignors were directed to quit work, was “not within the issues, nor is it supported by the preponderance of the testimony. There is no suggestion in the complaint that the respondent or his assignors were di-

rected to quit. On the other hand, the complaint is drawn upon the theory that they had performed their contract, that they had demanded deeds, and that the appellant's title to the land was defective." We also said:

"The appellant's version that they quit voluntarily because they claimed that they were not being paid for all the clearing is corroborated by the silence of the complaint upon this question, by the letter of their counsel, and by all the attending circumstances."

In the petition for rehearing, it is said that the opinion is in conflict with *Gold Ridge Mining & Development Co. v. Rice*, ante p. 384, 137 Pac. 1001, where we said:

"In respect to the contention that the counterclaim is not pleaded, it is sufficient to say that the evidence was admitted without objection, and, under the uniform decisions of this court, the issues became as broad as the evidence."

We do not regard the cases as conflicting. We did not hold in this case that the issues had not been broadened by the evidence, but merely adverted to the silence of the complaint, and its general theory and scope, as circumstances tending to corroborate the theory of the appellant; that is, that the respondent and his assignors voluntarily quit work. The two cases, when carefully read, show no inconsistency. After stating that the finding was not within the issues, we proceeded to discuss the evidence upon which the finding was based, and held that the respondent had failed to establish his discharge by a preponderance of the evidence.

It is also argued in the petition for rehearing that the letter set out in the opinion does not imply that the laborers voluntarily quit work. We think, when read in the light of the record, the letter is a circumstance tending to show that fact. Torn from its setting, it may not have that effect. It may even be a slight circumstance. Be this as it may, the writer of the opinion, after reading the abstract of the evidence, disregarding this letter, had no doubt that the respondent and his assignors voluntarily quit work because

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they were dissatisfied with the acreage they had been allowed. After reading the evidence of the respondent and his witnesses touching the character of the work they did, in the light of the evidence of the several disinterested witnesses of the appellant upon that question, the conclusion was forced upon the writer that the testimony of the former was not trustworthy.

The petition is denied.

ALL CONCUR.

[No. 11425. Department Two. January 17, 1914.]

*In re LEARY AVENUE, SEATTLE.*¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — BENEFITS — APPORTIONMENT — APPEAL — REVIEW OF ASSESSMENT. Where, in providing for an improvement to be paid for by special assessment upon property specially benefited, the council provided that any part of the costs not properly assessed against benefited property shall be paid for from the general fund, the superior court on appeal from the assessment, has power to apportion the costs between the city and property owners, and is not bound by the apportionment of the eminent domain commission.

SAME — APPEAL — REVIEW — PRESUMPTIONS. Upon an appeal from a judgment modifying an assessment by eminent domain commissioners, any presumption would be in favor of the judgment.

Appeal from a judgment of the superior court for King county, French, J., entered July 16, 1913, upon findings modifying an assessment of benefits for a local improvement, upon appeal from the decision of the eminent domain commissioners. Affirmed.

James E. Bradford and *C. B. White* (*Howard A. Hanson*, of counsel), for appellant.

John P. Hartman, *Kerr & McCord*, *James M. Gephart*, and *Farrell, Kane & Stratton*, for respondents.

¹Reported in 138 Pac. 8.

PARKER, J.—This appeal has to do with the local assessment branch of an eminent domain proceeding, by which the city of Seattle has acquired the right to widen and extend Leary avenue, in the northerly portion of the city. After the awards were made for the taking and damaging of private property necessary to widen and extend the avenue, it became necessary to provide a fund to pay the amounts of the awards, approximating \$356,000, in addition to a contribution made by the Northern Pacific Railway Company of \$40,000. To that end, an assessment roll was prepared and filed, in due course, by the eminent domain commissioners, wherein they charged and apportioned, against the private property which they deemed specially benefited by such widening and extension of the avenue, eighty per cent of the amount necessary to be so raised, and charged twenty per cent thereof against the city because of resulting public benefits. Hearing upon the roll before the superior court was had in due course, when, after receiving evidence, and hearing argument of counsel thereon, the court rendered its decision and judgment, finding therein, among other things, as follows:

“That the improvements contemplated and ordered as set forth in the proceedings in this cause, are of special benefit to the property embraced in the district as made by the eminent domain commission, which is shown upon the map which is plaintiff’s Exhibit “B,” and likewise of special benefit to the city of Seattle and to all the taxpayers of the city of Seattle, for the reason that the said Leary avenue is one of the principal arterial highways of the city of Seattle, connecting all sections of the city, and particularly the business center of the city of Seattle, which will largely use said Leary avenue, with the outlying district commonly referred to as Ballard, and other sections of the northern part of the city.

“That the property embraced within the special assessment district as determined by the eminent domain commission is not benefited to the extent of the amount which was assessed against it, but is benefited to the extent of fifty per

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cent of the total cost of said improvement, plus one-half of the accrued interest, and no more."

In accordance with these findings, the court ordered the commission to recast the assessment, and charge one-half of the amount necessary to be raised against the city, and one-half against the private property specially benefited. From this decision of the superior court, the city has appealed to this court.

The contentions of counsel for the city are, for the most part, directed against the court's findings above quoted. The testimony of the witnesses, together with the map of the northerly portion of the city, introduced in evidence, showing the avenue as it will be widened and extended, it seems to us, leaves but little room for arguing that the avenue, when widened and extended as contemplated, will not be a main arterial highway. It will run in a generally north-westerly and southeasterly direction through a portion of the city which is already platted by streets running east and west and north and south, with blocks of ordinary size, and will furnish a comparatively direct highway between the central business portion of the city and the northerly portion thereof, lying even beyond the territory through which its widened and extended portions pass. Touching the question of apportioning the cost between the city and the specially benefited private property, the evidence is, to a considerable degree, in conflict. However, after a careful review of all of the evidence to which our attention has been called in the abstracts of the record prepared by counsel for the city and for the private property owners, and being mindful of the presumption existing in favor of the apportionment made by the eminent domain commissioners, we are unable to say that the court did not arrive at a correct decision upon that question. We do not deem it profitable to enter upon a detailed discussion of the evidence here with a view to demonstrating the correctness of the learned trial court's decision.

Some contention is made by counsel for the city which seemingly is an attack upon the power of the superior court to charge against the city a greater sum than is authorized to be charged by the city officers or the eminent domain commission in a proceeding of this nature. If the city council, in the initial ordinance providing for this proceeding, had expressly provided that the entire cost should be paid by special assessment against the benefited property, there would be ground for such a contention. But in the initial ordinance providing for this proceeding, we find, among other things, the following:

"That the improvement provided for in this ordinance be paid for by special assessment upon property specially benefited in the manner provided by law. Any part of the costs of said improvement that is not finally assessed against the property specially benefited shall be paid from the general fund of the city of Seattle."

From this it is apparent that the city council expressly authorized the charging against the city of whatever portion of the cost could not be raised by assessing the private property to the extent of its special benefits; and since the superior court found that the private property did not receive special benefits exceeding fifty per cent of the total cost, which finding we conclude must be sustained, it seems plain that the balance is chargeable against the city. We have heretofore held that the statute under which this assessment is made, Rem. & Bal. Code, §§ 7790, 7795, 7796 (P. C. 171 §§ 75, 85, 87), gives the superior court power to adjust the apportioning of the cost between the city and the property owners so that each may pay a due proportion to the same extent as the court has power to revise and correct the assessment made by the commission in other respects. *In re Pike Street*, 42 Wash. 551, 85 Pac. 45; *Spokane v. Gilbert*, 61 Wash. 361, 112 Pac. 380. In both of these decisions, the judgments of the superior court were affirmed, although the judgments reversed decisions of the commis-

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sions upon the question of apportioning the charge between the specially benefited property and the city. Of course, when the city by its ordinance renders it plain that it intends that no part of the cost shall be charged to the city, we have quite a different question. This phase of the question was dealt with in *Spokane v. Curtiss*, 66 Wash. 555, 120 Pac. 70, cited by counsel for the city, where the judgment of the superior court was reversed, and the decision of the commission affirmed by this court upon the ground, among others, that the original ordinance specifically provided that the cost should be paid "wholly by special assessment upon the property benefited." This, of course, would not authorize charging the specially benefited property beyond the benefits, but it would prevent the charging of any part of the cost against the city. Under such circumstances, the project might fail for inability to raise sufficient funds by the special assessment, because of lack of benefits, but that would not compel the city to contribute against its will. In the case before us, the city expressly agreed to contribute. In *In re Elliott Avenue*, 74 Wash. 184, 133 Pac. 8, cited by counsel for the city, this court reversed the trial court and affirmed the decision of the commission. Justice Morris, there speaking for the court, said:

"While the lower court has the authority under the statute to modify the assessment roll as returned by the commissioners, to the end that justice may be attained and each tract of land benefited bear its relative equitable proportion of the cost of the improvement, as is said in *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121, the power so vested in the court must be exercised under the evidence. Like other instances where a discretion is vested in the trial court, it is a judicial discretion and must be exercised according to the facts before the court. In this case the lower court, while frankly admitting there was no evidence to justify its ruling, was of the opinion that the general fund should bear ten per cent of the entire assessment, because he believed that the improvement was 'a part of

the thoroughfare that we are laying out to Smith's Cove.' We find no evidence of that fact."

Manifestly, there was in that case no basis upon which to rest the superior court's reversal of the commission's decision. Our attention has been directed to a number of our previous decisions wherein varying expressions are found touching the presumption of correctness of the decision of the eminent domain commission in determining the amount of benefits, apportioning the same, and in fixing the boundaries of the district. In addition to the decisions already noticed, our attention is called to the following eminent domain assessment cases: *In re Seattle*, 46 Wash. 63, 89 Pac. 156; *In re Harvard Avenue North*, 47 Wash. 535, 92 Pac. 410; *In re Seattle*, 50 Wash. 402, 97 Pac. 444; *In re Pine Street*, 57 Wash. 178, 106 Pac. 755; *In re Jackson Street*, 62 Wash. 482, 113 Pac. 1112; *In re Twelfth Avenue*, 66 Wash. 97, 119 Pac. 5; *Spokane v. Miles*, 72 Wash. 571, 131 Pac. 206. It is worthy of note that, in all of these cases, this court affirmed the superior court, which had in turn affirmed the decision of the eminent domain commission. So that all of those cases came to this court with the full strength of the presumption in favor of both the commission's decision and the superior court's decision. In the case before us, if there be any presumption either way, it should be in favor of the judgment of the superior court rather than against that judgment, since that is the judgment we are reviewing. We do not see our way clear to disturb the judgment of the superior court.

The judgment is affirmed.

CROW, C. J., FULLERTON, MOUNT, and MORRIS, JJ., concur.

[No. 11510. Department Two. January 17, 1914.]

MANHATTAN COMPANY, INCORPORATED, *Respondent*, v.
UNITED STATES FIDELITY & GUARANTY COMPANY,
Appellant.¹

PRINCIPAL AND SURETY—RELEASE OF SURETY—OVERPAYMENTS—PREJUDICE. A compensated surety on a building contract is not prejudiced, and is therefore not released, by payments made during the progress of the work in excess of the amounts due the contractor, where they were necessary to protect the property from lien claims of laborers, the amounts of which were not questioned; nor by a small excess payment which was less than a credit afterward given for extra work.

SAME—RELEASE OF SURETY—TAKING OVER WORK. The payment of laborers on a building when the contractor was unable to pay them, is not a taking over of the work, where it was simply to protect the building from labor liens and the contractor was allowed to go on with the work.

Appeal from a judgment of the superior court for King county, Humphries, J., entered May 24, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

McClure & McClure, for appellant.

Holzheimer & Herald, for respondent.

PARKER, J.—This is an action upon a surety bond, executed by the defendant O. W. Lindsley as principal, and the defendant The United States Fidelity & Guaranty Company as surety, to secure the faithful performance of a building contract on the part of Lindsley. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff against both defendants, from which the defendant Guaranty Company has appealed.

On March 16, 1912, the defendant Lindsley entered into a contract, in writing, with respondent, Manhattan Company,

¹Reported in 137 Pac. 1003.

whereby he agreed to furnish all labor for, and to perform certain specified portions of the work of constructing, a building then in course of construction by respondent in Seattle. The portions of the contract we are here concerned with read as follows:

"Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payments under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner."

"Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and labor shall be common brick five and no-100 (\$5.00) dollars per M., kiln count—press brick and arch brick, fifteen and no-100 (\$15.00) dollars per M., kiln count—setting stone and cast iron plates, seventy-five and no-100 (\$75.00) dollars. If arch brick ought to be cut an additional sum of ten and no-100 (\$10.00) dollars per arch will be paid to party of first part by party of the sec-

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ond part, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor, in current funds and only upon certificates of the architect as follows: Eighty-five (85) per cent to be paid as work progresses on weekly payments.

"Party of the first part must show receipts for all labor at the time each payment is made.

"The final payment shall be made within fifteen (15) days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

"If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default."

Thereafter, on March 18, 1912, the bond here involved was executed by Lindsley and the Guaranty Company, as principal and surety, respectively, in the sum of \$1,000, to secure the faithful performance of the contract on the part of Lindsley, which bond contains, among other things, the following:

"Now therefore, the conditions of the foregoing obligation is such that if the said principal shall well and truly indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law;

"Provided, however, that this bond is issued subject to the following provisions:

"First: That no liability shall attach to the surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the obligee shall promptly,

and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in the city of Baltimore written notice thereof, with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office at city of Seattle, Wn. and the consent of the surety thereto obtained, before making to the principal the final payment provided for under the contract herein referred to.

"Second: That in case of such default on the part of the principal, the surety shall have the right, if it so desires, to assume and complete or procure the completion of said contract; and in case of such default, the surety shall be subrogated and entitled to all the rights and properties of the principal arising out of said contract and otherwise, including all securities and indemnities theretofore received by the obligee and all deferred payments, retained percentages and credits, due to the principal at the time of such default or to become due thereafter by the terms and dates of the contract."

On April 18, 1912, Lindsley commenced work under the contract. On April 20, the respondent paid to Lindsley \$100, which was \$60 in excess of the amount then due him under the terms of the contract. On April 27, respondent paid to Lindsley \$295, which was \$58.50 in excess of the amount then due him under the terms of the contract after deducting the excess theretofore paid. On May 3, respondent paid to Lindsley \$270, which was somewhat in excess of the amount then due him under the terms of the contract after deducting excess payments theretofore made. The amount Lindsley was then overpaid is not made plain by the evidence, though we assume that, if the work progressed substantially as during the previous week, the excess payment was but a very small amount. The reason for the excess in the first payment is not shown. The excess in the second and third payments appears to have been to enable Lindsley to pay his workmen. In any event, it seems plain that all the money of the second and third payments was used in paying wages of workmen employed by Lindsley upon

the building. On May 11, Lindsley being unable to pay his workmen, they were paid direct by respondent, the amount so paid being \$548.80. This was somewhat in excess of the amount then due Lindsley under the terms of the contract, though to what extent we are not informed. On May 18, Lindsley being again unable to pay his workmen, they were paid direct by respondent, the total amount so paid being \$681.80. This was \$528 in excess of the amount then due Lindsley under the terms of the contract. On that day, respondent duly notified appellant Guaranty Company of this payment and of the amount of the excess, stating in the notice, among other things, the following:

"O. W. Lindsley has notified us of his inability to pay the amount of wages due to his employees upon said work, and said employees have made to us claims and demands for such wages and have threatened to file liens therefor.

"Pursuant to the terms of said contract, you are notified that we have retained out of any payment due or to become due to said contractor under said contract, and have advanced sufficient money to pay and have paid to said employees the full amount of their said claims for said labor."

On May 24, Lindsley being again unable to pay his workmen, they were paid direct by respondent, the amount so paid being \$458.40. This also was in excess of the amount then due Lindsley under the terms of the contract. On June 1, Lindsley being again unable to pay his workmen, they were paid direct by respondent, the amount so paid being \$479.90. This was also in excess of the amount then due Lindsley under the terms of the contract. On June 8, Lindsley's workmen were paid direct by respondent for the same reason, the total sum of \$90.75. This also was in excess of the amount then due Lindsley under the terms of the contract. Immediately following each of these payments made to Lindsley's workmen after May 18, appellant Guaranty Company was duly notified thereof, in substance as it was notified on May 18, of the payment to Lindsley's workmen on that date. On June 10, Lindsley abandoned the

work. On June 11, respondent duly notified appellant Guaranty Company of Lindsley's abandonment of the work. That notice, among other things, contained the following:

"You are further notified that pursuant to the terms of said contract, by reason of the abandonment of said work by said contractor, unless provisions are made by you to complete said work within three days from date hereof we will take possession of said premises and complete said work, and hold said contractor and you upon your bond for the difference between the cost of said work and the contract price."

On June 17, appellant Guaranty Company having failed to take any steps looking to the completion of the performance of Lindsley's contract, respondent took charge of the work and completed it. It seems plain from the record before us that it was necessary for respondent to make all the payments to Lindsley's workmen which we have noticed, in order to protect the property from liens of the workmen. It does not seem to be seriously contended that the amounts thus paid were not due the workmen or that the workmen were not claiming and entitled to have liens upon the building as security therefor. The amount which respondent thus paid to Lindsley and his workmen in excess of the amount Lindsley would have earned under the contract was \$1,655.87. From this there was, by the court, deducted \$115, due from respondent to Lindsley for work which he had performed outside of that included in his contract, and judgment was rendered against Lindsley for the balance of \$1,540.87, and against appellant Guaranty Company for \$1,000, the amount of the bond upon which it was surety.

The principal contention of counsel for appellant is that it was released from all obligation under the bond because of these payments made by the respondent to Lindsley and his workmen. This contention is rested upon the general rule, recognized and announced by this court in *Peters v. Mackay*, 20 Wash. 172, 54 Pac. 1122, that the surety is released where the payments to the contractor are in excess of the

amounts provided for under the contract. In that case, apparently, the court took no notice of the exceptions to this rule, nor did it give any attention to what extent the rule might be regarded as modified in applying it to payments made which did not work to the prejudice of the surety. It is also worthy of note that, in that particular case, the surety was manifestly not a paid surety as in this case. In the later case of *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. 833, the court had under consideration a state of facts which did involve an exception to the rule announced in *Peters v. Mackay*; that is, a situation where the payments were without prejudice to the rights of the surety. It was there said:

"The next objection urged is that the respondent paid the contractor the sum of \$300 at a time when the same was not due or payable under the terms of the contract. The facts in relation to this payment are these: The payments were due in installments under the contract, and were to be made on certificates of the architect. The first certificate was given July 10, 1902; the second, August 20, 1902; the third, September 5, 1902; and the fourth, November 11, 1902; and the payments were made on or about the same dates. On September 15, 1902, the respondent loaned or advanced to the contractor the sum of \$150, and a like amount on September 25, 1902. These amounts were repaid or deducted from the last certificate of November 11, 1902. Whether this was a loan, as claimed by the respondent, or an advancement under the contract, as claimed by the appellant, is wholly immaterial. The money was used by the contractor in the construction of the building, and the appellant was benefited rather than prejudiced by the irregular payments."

The view that overpayments not resulting in prejudice to the surety will not discharge its obligation, also finds support in *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280, and *Black Masonry & Contracting Co. v. National Surety Co.*, 61 Wash. 471, 112 Pac. 517. In *Leiendecker v. Aetna Indemnity Co.*, 52 Wash. 609, 101 Pac. 219, relied upon by counsel for appellant, the contractor was paid his entire contract price before work upon the building was

even commenced, without the knowledge of the indemnity company, while the bond, by its very terms, expressly required that he should reserve payment "until the expiration of the time within which liens or notices of liens may be filed." It was, of course, rightly held in that case that full payment before the commencement of the work discharged the surety. In *Black Masonry & Contracting Co. v. National Surety Co.*, *supra*, relied upon by counsel for appellant, the owner paid the contractor \$3,500 upon a \$16,500 contract before anything whatever was due the contractor thereon. The substance of the holding in that decision was that there was such a substantial change, or rather, violation, of the terms of the contract as to release the surety, in view of the provisions of the contract for payments only after the stone had actually been placed in the building, there being no stone placed in the building at the time of the \$3,500 payment. That case also differs from this in that the payment was made direct to the contractor and not to those who may have had liens upon the building. Nor does it appear with certainty that the money paid the contractor was ever used by him in paying for labor or material used in the building. Nor does it appear that such payment was necessary to relieve the building from lien claims. In the case before us, all payments made after the third payment were made direct to workmen who had valid lien claims upon the building, the amount and validity of which are not questioned. Article 9 of the contract above quoted, it seems to us, clearly gave to respondent the right to protect the building from these liens by paying the same and charging the amounts so paid against Lindsley, even though the required amount was larger than the amount due Lindsley at the time of payment. We do not think that this was a change or violation of the terms of the contract between respondent and Lindsley for the faithful performance of which the bond was given.

The first, second and third payments made by respondent

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direct to Lindsley, it seems plain, at no time resulted in Lindsley being overpaid to exceed \$100. This small overpayment, it seems to us, in view of the quantity of work to be performed under the contract, the fact that these overpayments occurred so early in the work, and the fact that Lindsley was thereafter given credit for \$115 for work which he did for respondent entirely outside of that specified in the contract, should not be held to be a material change or violation of the terms of the contract. We are unable to see that these payments resulted to the prejudice of appellant.

Some contention is made on behalf of appellant that it was discharged from liability under the bond because respondent's action in paying Lindsley's workmen on May 11 and following was, in substance, a taking over of the work from Lindsley by respondent. We cannot agree with this contention. It seems apparent that respondent was doing nothing more than protecting itself against the liens of Lindsley's workmen. Lindsley continued with the work with every appearance of an intention to complete it for a considerable time thereafter, and after appellant was notified of respondent's paying Lindsley's workmen and of the necessity therefor. We think this did not have the effect of taking over the work by respondent without due notice to appellant.

We are of the opinion that the judgment should be affirmed. It is so ordered.

Crow, C. J., FULLERTON, MOUNT, and MORRIS, JJ., concur.

[No. 11414. Department One. January 17, 1914.]

EDWARD H. O'DANIEL *et al.*, Respondents, v. W. M. STREEBY,
Appellant, WILLIAM L. TIPTON *et al.*, Defendants.¹

BROKERS—AUTHORITY—FRAUD—LIABILITY OF PRINCIPAL. A broker employed to conduct negotiations for the sale of real property upon a commission has apparent authority to represent what was appurtenant to the realty, and the principal is liable in damages for his fraudulent representations relating thereto.

VENDOR AND PURCHASER—REMEDIES OF VENDEE—FRAUD—MISREPRESENTATIONS—RELIANCE. The purchaser of real property has the right to rely on representations, made in answer to a direct inquiry, as to what trade fixtures were appurtenant to and passed with the land, where there was nothing in their appearance that negated the idea that they were part of the realty.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 30, 1913, upon findings in favor of the plaintiff, in an action for fraud, tried to the court. Affirmed.

Scott & Campbell, for appellant.

G. G. Ripley, for respondents.

ELLIS, J.—This is an action for damages because of an alleged misrepresentation made by an agent on a sale of real estate. The court, in substance, found that the defendant Streeby was the owner of the real estate in question on September 1, 1910; that the defendant Tipton, as agent for Streeby, and for a commission, negotiated a sale of the premises in question to the plaintiffs, who purchased the premises, paid the purchase price, and received a deed thereof from the defendant Streeby; that Tipton, during the negotiations by which the sale was accomplished, represented to the plaintiffs that the following articles, namely, a meat market refrigerator, shelving in a storeroom, kitchen sink, storm sash, seven screen doors, warehouse, pieces of 2x6 scantling

¹Reported in 137 Pac. 1025.

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in attic, lumber from tent in rear of barn, and sundry other boards, all of which were then on the premises, belonged to, and were a permanent part of the realty; that these representations were false in that these articles were placed on the premises by one Floan (a tenant) who, by agreement with Streeby, owned them and had the right to remove them, and subsequent to the conveyance, did remove them; that these articles were of a reasonable value of \$504; that these representations were a material inducement to the plaintiffs in making the purchase, and that the plaintiffs had no knowledge or notice of their falsity till long afterwards. We have examined the evidence, which is conflicting, with much care, but its discussion in detail would merely lengthen this opinion to no useful purpose. We are convinced that, by a clear preponderance, it supports the court's findings. Tipton's agency to find a purchaser and negotiate a sale of the real estate was clearly established, and it was also established by the evidence and, in fact, conceded in argument, that the warehouse, refrigerator and shelves were the chief things in issue, and were of such character and were so attached to the realty as to be a part of it, but for the agreement with the tenant that he might remove them. It is conceded that the other articles were of little value. Upon these findings and suitable conclusions of law, the court entered judgment for the plaintiffs and against the defendants for \$504, with legal interest from September 1, 1910, and for costs. At appropriate times, the defendants moved for a nonsuit and for a new trial. Both of these motions were overruled. The defendant Streeby appeals.

The appellant presents his several assignments of error under two heads, contending (1) that the authority of the agent was limited to the mere finding of a purchaser, and that he could not bind the principal by his representations; (2) that, conceding a general authority to make the representations claimed, they were not such that respondents had the right to rely upon them.

I. The appellant claims that his agent, Tipton, had no authority to make any representations concerning what was appurtenant to and passed with the realty which would bind the appellant as principal. It is, of course, a general rule that third parties dealing with an agent cannot rely upon the agent's assumption of authority, but must, at their own risk, ascertain both the fact of agency and the extent of the agent's authority. The burden is upon them to show that the acts of the agent were within the scope of his authority. But it is also a general rule that when the fact of agency is once established, the principal is bound by the acts of his agent within the apparent scope of his actual authority, or that authority which the principal knowingly permits the agent to assume. 1 Am. & Eng. Ency. Law (2d ed.), p. 989. What comes within the apparent scope of an agent's authority, whether the agency be general or special, is determined by what is usual or necessary to the performance of the principal power; that is, what is necessary to effect the purpose of the agency. Such necessary powers are *prima facie* incident to every authority.

"The principle is elementary and uniform that a power given an agent in a transaction carries with it the authority to do whatever is usual and necessary to carry into effect the principal power. And this applies as well to special as general agents, unless the manner of doing the particular act is prescribed by the power." 1 Am. & Eng. Ency. Law (2d ed.), pp. 997, 998.

See, also, *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593. It would seem to follow as a corollary that, where the acts done come within the apparent scope of the authority so defined, it is incumbent upon the principal seeking to avoid liability for such acts to show not only that the authority to do the acts was not expressly given to the agent, but that the authority was expressly withheld and that the person dealing with the agent had knowledge of that fact.

The application of these general principles to the facts be-

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fore us makes it plain that the agent had authority to represent what was appurtenant to the realty, so as to bind the appellant. It was clearly established that the agent was authorized to conduct the negotiations for the sale, merely submitting the terms of the sale to the principal for approval. The appellant himself so testified. He admitted that he never, at any time during the negotiations, communicated with the respondents or their agents. Such an authority clearly empowered the agent to point out and exhibit to the purchaser the property to be sold. That was a necessary part of the most preliminary negotiation. There could hardly be a beginning of negotiations without an indication to intending purchasers of the subject-matter of negotiation. If, therefore, the fixtures pointed out and exhibited by the agent as part of the realty were of such a nature and so attached that, in the absence of an agreement with the tenant to the contrary, they would have constituted a part of the realty, then, as between the principal and purchaser, the principal was bound by his agent's representations. There was no pretense on the appellant's part that he ever actually informed the agent that these articles were not his own. He does not claim to have limited the agent's authority by any express instructions in that particular. The representations were made by the agent in the line of his employment. They were within the apparent scope of the agent's authority even as admitted.

"We judge from the remarks interjected by the court during the trial that it entertained the view that the owner of the land was not responsible to the purchaser for the fraudulent representation of its selling agent. This, we think, was a wrong theory of the law. The owner is the beneficiary of the sale. The salesmen are his agents, and under the ordinary rule of agency the owner is responsible for the representations of his agent made in the line of his employment. It is true that the agency in this case is one degree removed, Erickson, who sold the lots to appellant having been employed by Arnold & Nachant, the firm who had a contract with the owner to sell the addition, Arnold & Nachant agreeing to di-

vide with Erickson their commission on lots sold by him. But this was a mere detail as to the manner of sale by Arnold and Nachant. The owner was still equally the beneficiary of the transaction, and it would tend to encourage fraudulent misrepresentation if such owner were allowed to escape responsibility through the subterfuge of having the sale made by a subagent. It must not be allowed to disclaim responsibility and at the same time receive the benefit of the fraudulent transaction." *Nelson v. Title Trust Co.*, 52 Wash. 258, 100 Pac. 730

See, also, *Smith v. Gray*, 52 Wash. 255, 100 Pac. 339. The case of *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180, mainly relied upon by the appellant is clearly distinguishable from the case here. In that case, the agent's representations were as to the physical condition of the house, namely, that there was a brick foundation under the whole of it. The house was at hand and was examined by the purchaser, who at the time, was told where he could find a certain reputable contractor who had superintended the work of construction, but he made no personal examination or inquiry. The representation of the agent was not, as here, confined to an indication of the very subject-matter of the negotiation for the purpose of inspection, but went to its physical condition. The one was within the apparent scope of the agent's authority. The other was not. It may be conceded, as held in *National Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331, that "an agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representation as to the quantity or quality of the land," but even so, he surely has power to point out the thing to be sold if he has power to conduct the negotiations for its sale; that is to say, that act is within the apparent scope of his authority so as to bind his principal. That the representations attributed to the agent here were within the apparent scope of his authority is manifest from their very nature. The store-room itself, just as the articles here in question, might or might not have been a part of the realty as between the ap-

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pellant and his tenant, according as they had contracted. Had it been put there by the tenant under an agreement that he might remove it, it would have belonged to the tenant. *Morin v. Bremer*, 61 Wash. 62, 111 Pac. 1058. In such a case, had the agent, in exhibiting the property and offering it for sale, failed to advise the purchaser of that fact, and the principal, in making the deed, failed to except the building from the conveyance, no one would have had the hardihood to say that the suppression of that fact would not be actionable fraud. The principle here involved is exactly the same. True, the articles were such that they might be trade fixtures, but the purchaser made the direct inquiry of the agent authorized to negotiate the sale, and the agent, as the court found on what we deem sufficient evidence, represented that they were appurtenant to, and a part of, the realty. They were not excepted from the conveyance executed by the appellant pursuant to the agent's negotiations. On sound principles, these representations should be held binding on the principal, if they would bind him had he made them himself.

II. The appellant's second contention is that the plaintiffs had no right to rely upon the agent's representations for the reason that the subject-matter of the representations was at hand and that all of the facts concerning the articles in question and their ownership could have been readily ascertained by the exercise of ordinary care on the respondent's part. The argument in support of this contention proceeds upon the theory that, had the representations been made by the appellant himself, they would not have constituted actionable fraud. This position is obviously untenable. There was nothing in the appearance of the articles in question which negated the idea that they were a part of the realty. The representations were concerning a matter of fact peculiarly within the knowledge of the appellant and not within the knowledge of the respondents. When the respondents made the direct inquiry of the agent whether these articles went

with the realty, they had the right to assume that they would receive a truthful answer. It was not incumbent upon them, on receiving an answer in the affirmative, to make any further inquiry. As said in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102.

"Strong language has been used by this and other courts in defining the duties of a purchaser from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of *caveat emptor*."

See, also, *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903; *Kuehl v. Scott*, 66 Wash. 318, 119 Pac. 742; *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853; *Simons v. Cissna*, 60 Wash. 141, 110 Pac. 1011; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; and *Wilson v. Clark*, 63 Wash. 136, 114 Pac. 916.

The decisions chiefly relied upon by the appellant are clearly distinguishable from the case here. In *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366, it was represented as an inducement to the purchaser that a certain building was already in process of construction. The ascertainment of the fact was easy by a mere inspection of the property and its environment. Moreover, the broad doctrine laid down in that case has been much restricted by all of the more recent decisions in this state and by the trend of modern authority everywhere. In *Shores v. Hutchinson*, 69 Wash. 329, 125 Pac. 142, the purchaser entered upon and prosecuted an independent investigation of the condition of a corporation, stock in which he was purchasing and, as the opinion shows, was fully cognizant of all of the facts. It fully appears that he did not, in fact, make the purchase in reliance upon any representations made by the seller or his agent. The appellant here argues that no representation that personal property was, in fact, realty could make it realty. This argument, however, overlooks the fundamental

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consideration that whether or not the articles here in question were personal property was a question of fact which could not be discerned by mere inspection. It is admitted that all of the articles of any material value were of such nature and so attached as ordinarily to constitute a part of the realty. Had the representations been made by the appellant himself, there could be no question that they would have constituted actionable fraud. Having been made by his agent, and being such as fairly to come within the scope of his apparent authority and within the line of his employment, they bind the principal to the same extent as if made by the principal himself.

The judgment is affirmed.

Crow, C. J., Gose, Chadwick, and Main, JJ., concur.

[No. 11397. Department Two. January 20, 1914.]

NILS JOHANSEN, *Respondent*, v. PIONEER MINING COMPANY,
Appellant.¹

MASTER AND SERVANT—INJURY TO SERVANT—EMPLOYMENT OF NEGLIGENT FOREMAN—EVIDENCE—SUFFICIENCY. The negligence of a mine owner in employing and retaining a careless and negligent foreman is a question for the jury, where there was evidence that the foreman had, on several occasions, been negligent in his work and had a general reputation for carelessness in and about the mine and where he had previously worked.

SAME—EMPLOYMENT OF NEGLIGENT FOREMAN—EVIDENCE—REPUTATION—ADMISSIBILITY. In an action for injuries caused by the employment of a negligent foreman, it is admissible to show numerous specific independent acts of negligence on the part of the foreman together with a general reputation for carelessness.

SAME—NEGLIGENCE—APPLIANCES—SIGNAL SYSTEM—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained by a miner, being elevated out of the mine, when the signal service failed to work, the negligence of the master in failing to maintain a safe appliance for signals is for the jury, where it appears that the bell cord was slack and without sufficient supports, so that, when three

¹Reported in 137 Pac. 1019.

bells were given in the mine, the first pulls were not sufficient to ring the bell, and but one bell was rung, causing the engineer to mistake the signal and so run the elevator as to injure the plaintiff, and that this condition was known to the foreman for some time.

SAME—ASSUMPTION OF RISKS—UNSAFE WAYS—EVIDENCE—SUFFICIENCY. A miner, riding out of the mine on top of the elevator, as directed by the foreman, does not assume the risk from having adopted a perilous way out, when he might have adopted a safe way by climbing a ladder, where it was customary for men to ride out on the elevator, in which case it was stopped at the surface, and it would not have been dangerous if the elevator had been stopped at the surface according to the signal given, and the plaintiff did not know of the danger.

SAME—EMPLOYMENT OF INCOMPETENT SERVANTS—INSTRUCTIONS—COMMENT ON FACTS. Upon an issue as to the employment of an incompetent foreman, an instruction that, where a servant had been in the master's employ for a long time, the master is charged with knowledge of the servant's general reputation as to carelessness or incompetency, is proper and not an unlawful comment on the evidence, where it was conceded that the servant had been in his employ for a long time.

SAME—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS. A miner in riding out of the mine when going to lunch is still under the direction of the foreman, and where he rode on top of the elevator in obedience to orders of the foreman, he is not guilty of contributory negligence, unless the danger was so glaring and apparent that a reasonably prudent man would have refused to obey the order.

DAMAGES—PERSONAL INJURIES—AMOUNT OF RECOVERY—INSTRUCTIONS. An instruction limiting the damages for personal injuries to what will fairly and justly compensate the plaintiff for injuries shown by the evidence, is not erroneous in that it further refers to the items of lost time, and for permanent disfigurement, limiting each to the amount specified in the bill of particulars; nor on the ground that it assumes the fact of permanent disfigurement.

APPEAL—REVIEW—INSTRUCTIONS. It is not error to refuse instructions covered in the general charge.

NEW TRIAL—MISCONDUCT OF COUNSEL—DISCRETION. It is not an abuse of discretion to refuse a new trial on the ground of misconduct of counsel in commenting on the absence of one of the defendant's witnesses, where the case was reopened to allow an explanation of his absence, even though counsel again commented thereon.

APPEAL—REVIEW—NEW TRIAL. The denial of a new trial on the ground of misconduct of counsel will not be disturbed on appeal except for abuse of discretion.

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DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$18,000 for personal injuries sustained by a miner 29 years of age, earning \$4 a day and board and lodging, is not excessive where he was severely crushed and injured.

Appeal from a judgment of the superior court for King county, Myers, J., entered January 8, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a mine. Affirmed.

Ballinger, Battle, Hulbert & Shorts, for appellant.

Arctander, Halls & Jacobsen, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover damages for personal injuries received by him while in the employ of the defendant. The cause was tried to the court and a jury. A verdict was returned in favor of the plaintiff, and a judgment was entered thereon for \$18,000. The defendant has appealed.

The facts are substantially as follows: In the year 1910, the defendant was engaged in mining, in the Nome district, Alaska. It was operating a mine known as the Portland Bench. This mine consisted of a shaft which had been sunk to a depth of about 45 feet. At the bottom of this shaft, certain levels had been run in different directions. Within the shaft, the defendant had constructed an elevator for the purpose of elevating ore cars from the bottom of the shaft. This elevator extended above the surface something over twenty feet. The construction above the surface was a framework. At the top of this framework, was a timber called a cross-beam. Small cars were provided which were run into the levels and there filled with earth containing gold. These cars were then pushed into the elevator and lifted to a point about twenty feet above the surface, where they were run out on rails to what was called the dump.

The power for operating the mine was a steam plant, which was located about sixty feet away from the shaft. The

hoisting machine was within the power house. A cable ran from the hoisting machine to the top of the framework above the shaft, and extended down into the shaft. By this means, the elevator was run up and down the shaft. A system of signals had been arranged by the company for operating this elevator. The signal system consisted of a bell located in the power house. A wire cable extended from the bell to the top of the tower, where it connected with an angle iron which worked on a pivot. Another wire cable extended from a point on this angle iron down the shaft. When it was desired to hoist the elevator loaded with ore, the signal was one bell. When it was desired to hoist when men were upon the elevator, three bells in quick succession, a pause, and then one bell, were the signals given. These signals were given from the bottom of the shaft by pulling upon the signal wire, which extended vertically down the shaft. These signals indicated that, when men were upon the elevator, it was to be stopped at the surface of the shaft instead of being hoisted to the top of the framework. When one bell was given, it indicated that the elevator contained ore and that the elevator was to be raised to the top of the framework.

On the 27th day of March, 1910, the plaintiff had been in the employ of the defendant about nine days. It was his duty to shovel dirt into the cars and assist in pushing them to the elevator.

In addition to the elevator, the defendant had constructed a ladder reaching from the bottom of the shaft to the surface. This ladder was usually used by the men in going into and out of the shaft; but men frequently used the elevator for that purpose.

At noon on March 27, 1910, the men in the bottom of the shaft were going to their dinner. One Cooper, who was the foreman of the men employed in the shaft, was also at the same time going to his noon meal. The men were requested by Cooper to ride in the elevator instead of climbing the ladder. The men had taken their places within the cage of

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the elevator, when Cooper directed the plaintiff to climb on top of the cage because there was not room in the cage for all of them. In obedience to this request, the plaintiff climbed on top of the elevator cage and held to the cable which raised the cage up the shaft. Cooper then signaled the power house to hoist the cage. He gave three short jerks upon the signal wire, paused a moment, then gave another short jerk. But one bell rang in the power house. The engineer in the power house, instead of stopping the cage at the surface of the mine, caused it to be hoisted to the top of the framework above the surface. When the cage reached the top of the framework, the plaintiff was caught between the cage and the cross-beam and was crushed and badly injured.

The complaint alleged negligence in five particulars: First, that the foreman was incompetent and habitually negligent and the defendant, knowing these facts while the plaintiff was unacquainted therewith, retained such foreman in its employ; second, that the hoist house or power house, as it has heretofore been referred to, was stationed a long distance from the shaft and therefore made the place dangerous; third, that the signal system which was used at that time was defective and out of repair, and that the defendant knew thereof, while the plaintiff did not know of this defective condition; fourth, that the bell used in the power house was not of sufficient size to convey the signals to the operator of the hoisting engine; fifth, that the defendant was negligent in not employing a helper to assist the operator of the hoist in his work in the power house.

Defendant, for answer to this complaint, denied these allegations of negligence, and alleged affirmatively, first, that the accident and injuries to the plaintiff were caused by his own negligence in failing to choose a known safe way out of the mine instead of the dangerous method which he adopted; second that the injuries to the plaintiff were caused by his own carelessness and the carelessness and negligence of a fellow servant; third, that all the conditions surrounding the

plaintiff were obvious and apparent at the time and the plaintiff knew thereof and assumed the dangers; fourth, that, under the law of Alaska, the plaintiff and the foreman, Cooper, and the operator of the hoist, were fellow servants; that the accident was caused by the negligence of fellow servants for which the defendant is not liable; fifth, that the plaintiff had instituted a prior action in Alaska on the same cause of action, which was dismissed upon its merits with prejudice.

At the close of the plaintiff's evidence, and at the close of all the evidence, the defendant moved the court for a directed verdict. These motions were denied. After the verdict, the defendant moved the court for judgment *non obstante veredicto*, and for a new trial upon all the statutory grounds. These motions were also denied.

It is argued by the appellant that the court erred in denying the motions for a directed verdict and for judgment *non obstante veredicto*, for the reason that there was insufficient evidence to go to the jury upon the question of negligence of the appellant.

It is first argued by the appellant that the evidence shows that the foreman, Cooper, was a careful and competent man. There was evidence offered by the appellant to that effect. There was also evidence to the effect that Mr. Cooper, upon several different occasions, had been negligent in his work, and that his general reputation about the mine and where he had previously worked was that he was careless. It is plain, we think, that this made a question for the jury upon this point.

The appellant argues further that the court erred in receiving in evidence independent circumstances which might tend to show negligence, and also the general reputation of the foreman. We are cited to *Dossett v. St. Paul & Tacoma Lum. Co.*, 40 Wash. 276, 82 Pac. 273; *Hage v. Luedinghaus*, 60 Wash. 680, 111 Pac. 1041; and *Girocamo v. Tribble*, 70 Wash. 25, 126 Pac. 67. These cases, as we read them, were based upon a single act of alleged negligence. The rule is

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quite different where numerous acts are proved and where the general reputation of the servant for negligence is generally talked about. In *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, we said:

"We think it was also competent to show the general reputation of the pit boss for competency and regard for the lives and limbs of the miners under his charge . . .

"Specific acts of incompetency of the pit boss were admissible in evidence under the general allegation that the pit boss was ignorant and incompetent . . ."

Wigmore, in his work on Evidence, vol. 1, § 208, says:

"A single act may signify little, but two or three of an extreme quality would signify everything . . . Proof by reputation is inconclusive, and needs to be reenforced."

In 1 Bailey, Personal Injuries (1st ed.), § 1502, it is said:

"Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master may of itself, where it is his imperative duty to know the fitness of his servant, and where inquiry would have led to such knowledge, be such negligence as to charge the master."

We think it was not error to admit evidence of these several specific acts and of the general reputation of this servant. Upon this question, therefore, we think there was sufficient evidence to go to the jury.

The appellant argues at length that there was no evidence of the other allegations of negligence sufficient to go to the jury. The evidence on the part of the respondent showed that the foreman, Cooper, gave the proper signal at the bottom of the shaft to cause the elevator to be raised only to the surface. This signal was three sharp pulls on the wire, a pause, and then one pull. This indicated to the man who was operating the hoisting engine that men were upon the elevator, and that it should be stopped at the surface of the shaft. But one bell was rung in the power house, and the operator heard but one bell. This was accounted for on the

part of the respondent by the fact that the wire which extended from the top of the framework above the surface of the ground to the power house, was very slack. It had no supports under it. And when the jerks were given upon the wire, there was not sufficient force in the wire to ring the bell. It was shown that this condition had existed for some time, and that the foreman himself had complained to the operator of the hoisting engine of this fact. If this was true, as was testified to by witnesses, it made a clear case to go to the jury upon the question of the negligence of the appellant in not maintaining a safe appliance. If this bell wire did not ring the bell according to the signals which were given, it is plain that it was because the wire was slack or the appliance was unfit. The appellant knowing this fact, was liable by reason thereof. It is true this testimony was disputed, but there was clearly sufficient to go to the jury upon that question.

The appellant also argues that the evidence shows that the respondent adopted an unsafe way out of the shaft and selected a perilous and unsafe way voluntarily, and for that reason he cannot recover. It is true there was a ladder upon which the men were accustomed to climb out of the shaft. There was also an elevator by which men frequently were carried out of the shaft. The fact that signals were agreed upon for hoisting men from the shaft is sufficient alone to show that it was customary for men to ride out of the shaft in the elevator. The evidence shows that the respondent had been employed in the mine but a short time. He was directed by the foreman to climb on top of the cage. He was acquainted with the signals. It is apparent, we think, that if the cage had been hoisted to the surface of the shaft, which the signals given called for, that the respondent would not have been injured. The peril, if any existed, was that the elevator, instead of stopping at the surface as it was signaled to do, was raised more than twenty feet above the surface and to the top of the framework, and injury resulted therefrom.

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It cannot be said that the way out of the shaft by the ladder was less dangerous than the way out of the shaft by the elevator. One was as safe as the other if they had been properly used. So we think it cannot be successfully maintained that, even though the respondent climbed upon the top of the elevator of his own volition, that this shows that he chose a perilous rather than a safe way.

The rule contended for by the appellant is well settled that where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous rather than the safe way assumes the risk of the perilous way. But that rule does not apply to this case, because it was not shown that the plaintiff knew that the elevator was a dangerous way, or that it was in fact perilous. In *Campbell v. Winslow Lumber Co.*, 66 Wash. 507, 119 Pac. 832, we quoted with approval the language of Labatt, Master & Servant, § 439, in part as follows:

"In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from an obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order."

There was, therefore, no error in the trial court refusing to direct a verdict or to enter judgment in favor of the appellant *non obstante veredicto*.

The appellant next argues that the court erred in instructing the jury to the effect that the jury might consider specific acts of negligence on the part of the foreman, and his general reputation as being an incompetent and unfit foreman. Such evidence may be considered upon the question whether the appellant knew, or should have known of the foreman's negligence. What we have said heretofore, disposes of the question here presented.

The court instructed the jury as follows:

"It is the duty of the master to ascertain the character of the servants whom he employs and retains as to being

careless or otherwise. This duty is especially applicable in the case of a foreman. A foreman is one who has immediate charge of a gang of workmen, and whose orders and authority, in and about and concerning their work, the workmen are bound to obey. A master is under the duty towards his servants not to place incompetent or unfit persons in authority over his other servants. And in respect to a servant that has been in the master's employ for a long time, the master is charged with knowledge of such servant's general reputation in the community as to carelessness or incompetency."

It is argued by the appellant that this instruction is erroneous for the reason that it is a comment upon the weight of the evidence because the servant may have been in the employ of the master for a long time. We think there is no merit in this contention, because it was conceded that the foreman had been in the employ of the master for a long time. We think the instruction was proper and was a correct statement of the law. It was certainly not a comment upon a fact.

It is next argued that the court erred in instructing the jury as follows:

"If you find that Cooper was the mine foreman and that as such he was in charge of and had authority over the men in the mine, including plaintiff, and the only one who gave orders to the workmen in the mine and among them to plaintiff, and that the workmen, plaintiff with the others, were bound to obey his orders, that he gave plaintiff and others the order to ascend to the surface at the time in question, by way of the cage instead of by the ladders, and that he thereupon ordered plaintiff to ascend to the roof of the cage and to stand on its roof beam, then in that case, the court charges you that if plaintiff was injured in taking this position in obedience to this order, he is not guilty of contributory negligence in obeying the order, unless the danger was so glaring and apparent that a reasonably prudent person would have refused to obey the order given."

It is argued that this instruction is erroneous because there was no claim that the respondent was ordered to ascend to

the surface by way of the cage instead of by the ladder, and because the respondent was not at that time in the employ of the appellant, and was not required to obey the order if given. From what we have already stated, it is plain that the respondent's contention was that he was ordered to the roof of the cage by the foreman; at least, the respondent's testimony shows that he was directed by the foreman to ascend to the top of the cage, and that, in obedience to that request, he did so. It is plain, we think, that the respondent at that time was still under the direction of the foreman.

"One who is hired by the day, week or year, is just as much in his employer's service in going to and from his work as when actually engaged in the work itself." *Abend v. Terre Haute etc. R. Co.*, 111 Ill. 202, 53 Am. Rep. 616.

See, also, *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830.

The court instructed the jury that, if they found for the respondent, they should allow "what will fairly and justly compensate him for the injuries shown by the evidence, and for this purpose may consider" the time lost after receiving the injuries in which he had been prevented from earning wages by reason of the injuries sustained by him, not to exceed the sum of \$3,250, the amount given in the bill of particulars. And then followed a similar instruction with reference to other items named in the bill of particulars. Subdivision 5 of that instruction was as follows:

"For any and all permanent disfigurements, maimed and crippled condition of the plaintiff during the rest of his natural life, not to exceed, however, the sum of \$10,000."

The appellant contends that this instruction was erroneous because it specifically calls the attention of the jury to the bill of particulars; and particularly as regards the fifth subdivision above quoted relating to permanent disfigurement, for the reason that the same assumes that the respondent is permanently disfigured, maimed and crippled. But the jury were particularly told that they could find what would com-

pensate the respondent only for the injuries shown by the evidence. We think there was no error in this instruction.

In addition to these instructions, the appellant bases error upon other instructions which the court gave; and also upon a long list of instructions which were requested by the appellant and which were refused by the court. It is not necessary for us to set out these instructions at length, nor to state the grounds of the objections, because the instructions given by the court were clear and explicit and covered every phase of the case correctly. The instructions requested were either given in substance, or were not applicable to the case. Instructions to the jury should be short and concise. If the instructions requested by the appellant had been given, even if they correctly state the law, which we think some of them do not, the jury, we think, would not have been enlightened but probably would have been misled, on account of the length and involved condition of some of these requested instructions. It is sufficient to say that the instructions given correctly state the law of the case, and were sufficient to cover every point necessary to be considered by the jury.

It is also argued by the appellant that misconduct of counsel for the respondent during the argument of the case to the jury constituted reversible error. During the trial of the case, one of the appellant's witnesses by the name of Planting was not present, and had not been called by the appellant. Counsel for the respondent remarked to the jury upon this fact. Objection was made by the appellant, and the case was reopened to allow the appellant to show why the witness, Planting, had not been called. A showing was made to the effect that Planting had promised to be in attendance upon the trial, but was not there. After this fact had been shown, the respondent's counsel said: "I still insist on saying to you, ladies and gentlemen of the jury, where is Mr. Planting?" Other statements of the same character were made. Whether a new trial should be granted upon this ground alone is largely within the discretion of the trial court. The

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exercise of that discretion will not be disturbed except in cases of clear abuse. *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88; *Taylor v. Spokane, Portland & Seattle R. Co.*, 67 Wash. 96, 120 Pac. 889. We think there was no such abuse of discretion in this case as would warrant a reversal.

It is next argued that the verdict is excessive. The record shows that the respondent was a young man, 29 years old at the time of the accident; that he was a miner by occupation, capable of earning \$4 per day, and his board and lodging. He was severely crushed and injured. This case is very similar to *Gennaux v. Northwestern Imp. Co.*, 72 Wash. 268, 130 Pac. 495. The injuries to the respondent here are as great as the injuries to the respondent in that case. We there refused to find that the verdict was excessive, and we are of the opinion that the verdict in this case is not so excessive as to warrant a reduction.

Finding no error in the record, the judgment is affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11201. Department Two. January 21, 1914.]

FLORENCE COOPER, *Appellant*, v. FARMERS & MERCHANTS' BANK OF WENATCHEE, *Respondent*.¹

APPEAL—DECISION—REMAND—PROCEEDINGS BELOW. Upon reversal of a case for error in the exclusion of evidence, it is the duty of the trial judge to receive and weigh the evidence, and render judgment in accordance with his views of the law and the facts; and not to enter a judgment in accordance with the views he thinks the supreme court may take.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered December 4, 1912, upon find-

¹Reported in 127 Pac. 1011.

ings in favor of the defendant, in an action for money paid, tried to the court. Reversed.

Reeves & Reeves, for appellant.

R. S. Ludington and Ludington & Shiner, for respondent.

MAIN, J.—This cause was here upon a former appeal. The opinion then rendered is reported in 68 Wash. 310, 123 Pac. 465. For a statement of the facts, reference will be made to that decision.

The cause was there reversed, for the reason that the trial court had declined to permit certain evidence to be introduced which this court deemed relevant and material. Upon a retrial in the superior court, the evidence which had been refused upon the first trial was admitted. At the conclusion of the retrial, the court, believing that, by the decision of this court upon the former appeal, it had been directed to enter a judgment for the defendant, apparently did so believing that the weight of the evidence sustained the plaintiff's contention. In rendering his decision, the trial judge, while referring to the reversal by this court of the first judgment, among other things, said:

"Under this decision there is only one thing the supreme court is going to do with this case, and that is to hold that, irrespective of theories and irrespective of principles, that they just sort of feel that the plaintiff in this action ought not to recover and that the defendant should, and therefore they will so hold. I don't think that ought to be the real theory from the pleadings, or the facts before the court. Whether it is fortunate or not don't make any difference. They will do that. You can't go beyond it. They have already said in fact they are going to."

Thereupon judgment was entered in favor of the defendant, from which the present appeal is prosecuted.

We think the trial court did not correctly interpret the former opinion. Indeed, this court could not well have directed a judgment without knowing what the evidence was to be. Upon a retrial, it became the duty of the trial court to

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weigh the evidence which had been introduced and render judgment in accordance with his views of the law and the facts. From the opinion of the trial judge, it is very apparent that he believed the appellant had sustained her case by a fair preponderance of the evidence. Upon an examination of the record, it is apparent to us that he might well think so. Giving the evidence introduced upon the retrial, including that which had not been admitted upon the first trial, its full and fair consideration, it does not meet what this court in its former opinion held would be sufficient to justify a judgment for the respondent.

The judgment will be reversed, and the cause remanded with directions to the superior court to enter a judgment in favor of the appellant.

Crow, C. J., Ellis, Fullerton, and Morris, JJ., concur.

[No. 11375. Department Two. January 21, 1914.]

THOMAS O. MUSSELMAN, *Appellant*, v. W. S. KNOTTINGHAM
et al., *Respondents*.¹

PROCESS—SUMMONS—BY PUBLICATION — MAILING COPIES—AFFIDAVIT OF PUBLICATION. Upon a service by publication, a copy of the summons and complaint need not be mailed to the defendant's last known place of residence, where the affidavit for publication states that affiant does not know the place of residence of the defendant, in view of Rem. & Bal. Code, § 228, providing that the affidavit for publication shall recite that a copy of the summons and complaint has been deposited in the post office, directed to the defendant at his place of residence, unless it is stated that such residence is not known.

SAME—MAILING COPIES—DILIGENCE TO LOCATE DEFENDANT. In an action to foreclose a mortgage, a service by publication is regular, without mailing a copy of the summons and complaint, where the defendant was not a resident of the county, diligent effort was made to locate him, both through the sheriff's and city marshal's offices,

¹Reported in 137 Pac. 1012.

and publication was not commenced until shortly before the expiration of ninety days after filing the complaint, and the affidavit alleged that his residence was unknown.

MORTGAGES — FORECLOSURE — INSTALLMENTS — NOTICE MATURING WHOLE DEBT. Where there was no tender of interest overdue, an option in a mortgage to declare the whole mortgage due for nonpayment of interest is sufficiently exercised by the commencement of foreclosure proceedings.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered February 4, 1913, dismissing an action to set aside a foreclosure decree and sale, tried to the court. Affirmed.

Berkey & Cowan, for appellant.

C. H. Spalding, for respondents.

MORRIS, J.—The lower court denied appellant any relief in an action to set aside a decree of mortgage foreclosure, together with the certificate of sale and sheriff's deed, upon the ground that the judgment of foreclosure was void because of lack of jurisdiction in the court, due to alleged fatal defects in the attempt to obtain service by publication. The objection to the sufficiency of the service by publication is that no copy of the summons and complaint was mailed to the appellant's last known place of residence. Our statute, Rem. & Bal. Code, § 228 (P. C. 81 § 149), provides that the affidavit for publication shall recite that a copy of the summons and complaint has been deposited in the post office, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known. The affidavit upon which this publication was based recites "that affiant does not know the place of residence of said defendant." This recital was a full compliance with the statute, and because thereof, it was not required that it should contain a further recital of the mailing of a copy of the summons and complaint. The record shows that appellant was not a resident of Adams county where the foreclosure suit was properly instituted, and that a diligent effort upon the part of the

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attorney who had charge of the foreclosure proceedings and who made the affidavit to locate him so as to make personal service, both through the sheriff's office of Adams county and the city marshal of Odessa, was made, and that service by publication was not commenced until a few days prior to the expiration of ninety days after the filing of the complaint. We are, for these reasons, satisfied that service by publication was regular.

The foreclosure was had because of the default in the payment of taxes and an installment of interest, and complaint is now made that the lower court refused to permit appellant to make a showing that no notice was given him of the mortgagee's election to declare the whole sum represented by the mortgage to be due and payable because of default in the payment of interest and taxes. There was no tender of the interest due prior to the commencement of the foreclosure suit. The option contained in the mortgage to declare the whole debt due for nonpayment of interest was, therefore, sufficiently exercised by the commencement of the foreclosure proceeding. *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956; *Gunby v. Ingram*, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232.

Other reasons might be given why the judgment of the lower court was right, but as no other questions than those we have noticed are suggested by the appeal, no further discussion will be indulged in, and the judgment is affirmed.

CROW, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 11438. Department Two. January 21, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. E. H. CROSSEN,
Appellant.¹

LARCENY—DEFENSES—CLAIM OF TITLE—INSTRUCTIONS. In a prosecution for the larceny of "one head of neat cattle," from a range or pasture, in which the defense was that the accused had bought a calf of an Indian, and drove in and butchered the animal in question supposing it was the one he had bought, it is error to refuse to instruct as to the defense of Rem. & Bal. Code, § 2608, providing that it is a defense to a prosecution for larceny "that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable."

CRIMINAL LAW—TRIAL—PROVINCE OF COURT AND JURY—QUESTION OF FACT. Upon a prosecution for the larceny of "one head of neat cattle," referred to by the complaining witness as a steer, while defendant justified the taking of a "bull," claiming title, the court may not conclude the question of fact as to which was the correct description.

LARCENY—DRIVING CATTLE FROM RANGE—ESSENTIALS OF OFFENSE—INSTRUCTIONS. Upon a prosecution, under Rem. & Bal. Code, § 2605, subd. 4, for the larceny of one head of neat cattle by unlawfully taking it from a range or pasture, the jury should be instructed that it was essential to prove that the animal was taken or driven away from a range or pasture.

Appeal from a judgment of the superior court for Ferry county, Blake, J., entered February 19, 1913, upon a trial and conviction of grand larceny. Reversed.

Cornelius & Hooper, for appellant.

MORRIS, J.—Appeal from a conviction of grand larceny. The information charged the appellant with stealing "from a pasture and range one head of neat cattle," etc., and was evidently drawn under Rem. & Bal. Code, § 2605, subd. 4 (P. C. 135 § 703), including within the crime of grand larceny the unlawful taking of animals from any range or pasture. The defense was a taking under claim of right, appellant claim-

¹Reported in 137 Pac. 1030.

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ing that he had purchased a calf from an Indian; that he went out on the range and drove in the calf he supposed he had purchased, and butchered it; and if the calf taken was the property of the complaining witness, it had been taken under the honest belief that it was the calf purchased from the Indian. Supporting this theory, the court was requested to charge the jury as follows:

"You are instructed that, if you should find from the evidence that the animal killed by the defendant was the animal described in and identified by the state's evidence, and that it belonged to H. J. Carlstein, still you must find the defendant not guilty if you should further find that the defendant had purchased a calf from the Indian Long Alex, and that he killed the animal described as belonging to Carlstein by mistake, believing it to be the calf he had purchased from the Indian."

This request was denied, and error is now predicated upon such denial. This instruction, or one of similar import, should have been given. Section 2608, Rem. & Bal. Code (P. C. 135 § 709), embodying what has long been the law, provides that:

"In any prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable."

It was, therefore, the duty of the court, under the defense made, to include this statute, or its equivalent, in the instructions given. The court's refusal seems to have been based upon the theory that the complaining witness described the animal taken as a "steer," while the appellant described the animal he took and butchered as a "bull," and the court concludes it could not have been the same animal. The animal appellant was on trial for unlawfully taking was the animal described in the information as "one head of neat cattle," which was the only description of the animal the court was bound by. We do not think the court was justified in refusing the instruction because of its memory as to the peculiar description given by any witness of the animal referred

to in the information. Further, to refuse the instruction upon this ground would be for the court to conclude that the complaining witness was correct in describing the animal taken as a steer while the appellant was mistaken in referring to it as a bull. We do not think the court would be justified in so concluding a question of fact.

Another error assigned is the court's definition of grand larceny as:

"Larceny is defined to be the felonious taking and carrying away of the property of another without the knowledge or consent of that other and with the intent of the party taking at the time of the taking to permanently deprive the owner thereof, and with the further intent at said time to wholly and permanently appropriate it to the use of the party taking."

Whatever may be said as to the general correctness of this definition as applied to grand larceny, it was not sufficiently broad because of the fact that, under this information and the section under which it was drawn, the unlawful taking to constitute grand larceny must be from a range or pasture. Further on, the jury were told that the first essential was to find that "one head of neat cattle referred to in the information was taken, led, or driven away." Here again the court falls short of the crime defined and the crime charged in failing to add "from any range or pasture." This limitation of place is just as much a part of the crime defined and the crime charged as any other ingredient, and it was error not to include it. We are not clear that we would consider these last errors as sufficiently prejudicial to say they call for a new trial, as it doubtless might well be contended that there was no issue as to the place from whence the animal was taken. We think, however, as the case must be reversed for the first error discussed, it is best to call attention to these other assignments in order to eliminate any like question upon a second trial.

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Judgment reversed, and cause remanded for a new trial.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 11351. Department Two. January 21, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. A. W. SMITH,
Appellant.¹

FORGERY—CERTIFICATE OF IDENTIFICATION—INFORMATION—SUFFICIENCY. Under Rem. & Bal. Code, § 2583, with reference to the forgery of any "writing or instrument for the identification of a person," an information for the forgery of a certificate of identification of a workman on a railroad, showing on its face that it is such an identification certificate and one specifically prohibited to be forged, need not contain any extrinsic averments showing in what manner it was capable of being used; especially where it shows on its face that, if accepted as true by a disbursing agent empowered to issue pay checks, it might work a fraud upon the agent or the company.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 26, 1913, upon a trial and conviction of forgery. Affirmed.

Leola May Blinn and *Ivan L. Blair*, for appellant.

John F. Murphy, *Crawford E. White*, and *Reah M. Whitehead*, for respondent.

FULLERTON, J.—The appellant, defendant below, was informed against by the prosecuting attorney of King county for the crime of forgery in the first degree. At the trial, the jury returned a verdict finding him guilty as charged. Thereafter he moved in arrest of judgment, basing his motion on the ground that the facts stated in the information did not constitute a crime. The motion was overruled, and on the verdict of guilty he was adjudged guilty, and sentenced to a term of years in the state penitentiary. This

¹Reported in 137 Pac. 1008.

appeal is from the judgment and sentence pronounced upon him.

The information upon which the appellant was tried and convicted, omitting the formal parts, is as follows:

"I, John F. Murphy, prosecuting attorney in and for the county of King, state of Washington, come now here in the name of and by the authority of the state of Washington, and by this information do accuse A. W. Smith of the crime of forgery in the first degree, committed as follows, to wit:

"He, said A. W. Smith, in the county of King, state of Washington, on the 11th day of February, 1913, with intent to defraud, did then and there unlawfully and feloniously, well knowing the same to be forged, utter, offer, dispose of and put off as true to one J. B. A. Johnson, a certain false and forged instrument or writing, of the following tenor and effect, to wit:

Great Northern Railway Co.
Certificate of Identification.

Issue for the month of Feby 1913, Cascade Division, Section Gang No. 325 Working No. Seven

Signature of Workman:

Dan Armstrong,

John Hauser.

Foreman.

A certificate in this form may be issued to any workman, whether there is a balance due him or not, and is to be used as a means of identifying the workman to any agent who may be called upon for delivery of any pay-check or time-voucher which may be claimed.

The signature of the party calling for a pay-check or time-voucher should correspond to the signature of the workman in the space indicated above, which must be made in the presence of the foreman.

said instrument of writing then and there being an instrument or writing for the identification of a person, to wit, John Hauser:

"Contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

The single question suggested in this court is the sufficiency of the information. It is argued that the instrument alleged to have been forged is not one showing upon its face that it is capable of effecting a fraud, and hence extrinsic averments should have been made, showing how, and in what manner, a fraud could have been effected thereby. But while the rule contended for is, perhaps, applicable to instru-

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ments not specifically enumerated in the statute as being the subject of forgery, it has no application, we think, to instruments so specially enumerated. Stated in another way, if the instrument alleged to have been forged appears on its face to be one specifically prohibited to be forged by the statute, and it appears that it is capable of being used to defraud some person, it is sufficient to allege the forgery of the instrument without extrinsic averments showing in what manner it is capable of being so used. *Commonwealth v. White*, 145 Mass. 392, 14 N. E. 611; *People v. Johnson*, 7 Cal. App. 127, 93 Pac. 1042. The instrument here alleged to have been forged shows on its face that it is a "writing or instrument for the identification of a person," and as such is one specially mentioned in the statute as being capable of forgery. Rem. & Bal. Code, § 2583 (P. C. 135 § 659). That the instrument might be used to work a fraud is also apparent. It is alleged that the instrument was uttered and put off as true to one J. B. A. Johnson. If Johnson was a disbursing agent empowered to issue pay checks or time vouchers of the Great Northern Railway Company, it is easy to see how some such instrument properly issuable to John Hauser might have been thereby obtained from Johnson by the forger of the instrument. The instrument might, if accepted as true, work a fraud either upon Johnson or the Great Northern Railway Company, and the information is thus sufficiently full to meet the requirements of the law.

The judgment is affirmed.

Crow, C. J., MOUNT, PARKER, and MORRIS, JJ., concur.

[No. 10495. Department One. January 21, 1914.]

EDWARD WEBSTER, *Appellant*, v. JOHN L. BEAU *et al.*,
Respondents.¹

CONTRACTS—REQUISITES—AGREEMENT UPON TERMS—CONSTRUCTION. A contract whereby two persons agree to enter the fur trade by placing a stock of trade goods at such place as they may select, the stock to consist of such wares as they may deem proper, is not binding until they agree upon the place selected or approve a stock of goods which they deem suitable.

DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES—ANTICIPATED PROFITS. Anticipated profits cannot be recovered for breach of a contract of partnership to establish an entirely new fur trading business in a remote and sparsely settled country, under dangerous and adverse conditions, there having been no existing business; as the same are too remote, uncertain, and speculative.

SAME—MEASURE OF DAMAGES—EXPENSES AND LOSS OF TIME. Upon breach by defendant of a contract of partnership whereby plaintiff was to establish a new fur trading business in a remote and sparsely settled country, without reference to any existing business, the plaintiff may recover for losses sustained in the way of expenses incurred or loss of time in performing his part of the agreement.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 14, 1911, dismissing an action for breach of contract, notwithstanding the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits. Affirmed as to one defendant; reversed as to the other.

William Martin and *Hugh C. Todd*, for appellant.

Ira Bronson, for respondents.

CROW, C. J.—Action by Edward Webster against John L. Beau, H. T. Harding and Ed Born, to recover damages for the breach of a written contract. The complaint, which purports to state two causes of action, in substance alleges: That plaintiff has passed a number of years in that portion of Alaska within the Arctic Circle known as the "Mackenzie River Coun-

¹Reported in 137 Pac. 1013.

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try," which is inhabited by fur bearing animals; that, during his sojourn there, he acquired extensive and valuable information relative to the fur trade and the methods of obtaining furs from the native Indians and Eskimos; that in 1907, at Nome, Alaska, John L. Beau, one of the defendants, requested him to enter into negotiations with the view of jointly engaging in the fur trading business; that later he asked that plaintiff accompany him to Seattle to confer with the defendants H. T. Harding and Ed Born; that further consultations were held in Seattle, all parties named being present; that on November 12, 1907, a verbal agreement, previously made, was reduced to writing by Beau on behalf of himself and the defendants Harding and Born, in the form of a letter or proposition, which Beau signed, and which plaintiff accepted and also signed; that the defendant Beau then requested that plaintiff proceed to San Francisco, to ascertain the plans of the whaling fleet for the next season, and also to secure suitable men to assist in conducting the contemplated fur trading business; that Beau then advanced \$95 to plaintiff for immediate expenses, and promised further advances as needed; that plaintiff went to San Francisco, where he wrote a number of letters and sent a telegram to the defendant Beau, but received no answers; that in April or May, 1908, he mailed a registered letter to Beau, and received an answer in which Beau stated that he and his associates would not carry out the agreement; that plaintiff was capable of earning \$5 per day, and that, for money disbursed in necessary expenses and for loss of time, he had sustained a loss of \$1,985, upon which the \$95 advanced by Beau should be credited.

The written proposal upon which the second cause of action is also predicated reads as follows:

"Mr. E. Webster, Seattle, Wash., Nov. 12, '07.

"Seattle, Wash. Dear Sir:

"Reference our conversation regarding McKenzie River Expedition will say: We will arrange to place a stock of trade goods there at such a place as you and we may select.

The stock to consist of such wares as we may deem proper for the native trade purposes, shall constitute approximately the value of Twelve Thousand Dollars including duty and freight. The stock to be shipped on such carrier as will make best and lowest rates, concurrent with safety. The title and ownership of all wares and buildings erected shall be vested in us. You are to devote your time and efforts to handling and trading off the said wares and merchandise for fur, whalebone, etc., and for your services you are to receive thirty-three and one-third ($33\frac{1}{3}$) per cent of the net profit of the McKenzie 'Your Stations.' The fur and trade goods obtained by you in exchange and otherwise shall be turned over to us on arrival of our boat each and every season, such furs are to be kept separate and distinct and sold to the best possible advantage, and separate and distinct accounts kept and rendered to you. All accounts and invoices and all matters pertaining to your station shall be subject to your inspection at all times. Two-thirds or $66\frac{2}{3}$ per cent of the net profit shall go to us. In taking stock of inventory for purpose of ascertaining profit or net results the cost of building or equipment shall not be figured. We will put in another stock the second year as large or larger if you advise us by mail to increase, otherwise practically same amount and commodities. Following propositions are to be part of our agreement and you can avail yourself of any or either at any time.

"First. If the profits during or within five years shall be such that we have during these five years or before our money and one hundred per cent profit, then and in that event from that time on you shall receive fifty per cent profit and be the one-half owner of all stock and buildings and title vested in you to that extent.

"Second. If you at any time invest or put in $16\frac{2}{3}$ per cent of all capital invested in your stations, then and immediately thereafter you shall receive fifty per cent of the profits and the $16\frac{2}{3}$ per cent or one-sixth of the property shall then be vested in your name.

"Third. If at any time you can establish the conditions as in article first, you shall receive a salary in addition to the fifty per cent profit.

"Fourth. In case you have made one hundred per cent net profit or more the first year, then you shall have one-half

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or fifty per cent of the profit for your services and same ratio if the net profits shall be large, this also applies to subsequent years.

"Fifth. Any and all trading or buying the Schooner Abler does from Spring 1909 on between point one-half distance between Point Barrow and your station you shall receive twenty-five (25) per cent of the net profit. Of the profits derived from any purchases or trade made by Schooner Abler season 1908 from Camden Bay and East you will receive twenty-five per cent of the profits. Losses to be borne in same ratio as profit. You are to keep accurate account of all transactions.

"O. K. E. Webster.

Truly, John L. Beau."

For his second cause of action, the plaintiff, after pleading the agreement, in substance alleged that the defendants refused and neglected to purchase goods in the sum of \$12,000 for the partnership as agreed; that, as a result of such refusal, the entire season of 1908 was lost, together with profits that would have been earned by the plaintiff; that the portion of Alaska to which it was agreed the plaintiff should go with the goods was a section but little frequented by traders, where heavy profits in the fur, ivory and mercantile business would have been realized, and that the proposed partnership during the term of two years would have earned a net profit of \$75,000. Plaintiff demanded judgment for \$1,890 on his first cause of action, and for \$25,000 on his second cause of action.

The defendants John L. Beau and H. T. Harding admitted the execution of the written agreement by John L. Beau, but denied all other allegations of the complaint. The defendant Ed Born has been dismissed from the action, and no further notice will be taken of him. The first trial resulted in a verdict for \$14,905 in plaintiff's favor against the defendants Beau and Harding. Upon the hearing of the defendants' motion for a new trial, the trial judge, being of the opinion that anticipated profits were too remote and speculative to be made the basis of a recovery, ordered the

plaintiff to remit \$18,585 from the verdict, or accept a new trial. Plaintiff refused to make any remission, and a second jury trial was had before a different judge, who instructed the jury and tried the cause upon the theory that lost profits for one year only could be recovered, and that there could be no recovery for expenses or lost time. Following this instruction, the second jury returned a verdict for \$8,000 in plaintiff's favor against the defendant John L. Beau. Motions for a new trial were interposed by the plaintiff and the defendant Beau. The defendants also interposed a motion for judgment notwithstanding the verdict. The latter motion was sustained, and a judgment of dismissal was entered for the reason that the trial judge concluded that no contract between the parties had been proven. The plaintiff has appealed.

The trial judge in substance instructed the jury that the written instrument would not be binding upon the parties until (1) they agreed upon and selected a place or station in which to install their stock of goods, and (2) they had selected and approved a stock of goods which they deemed suitable for trading purposes. This instruction was given upon the theory that the written instrument itself contemplated the performance of these prerequisite conditions to make it a binding contract. There was evidence that the station and stock of goods had been agreed upon. As the jury found in appellant's favor on the issue involved, the instruction, although excepted to by appellant, could not have been prejudicial as against him; yet, in view of the new trial which must be ordered, we announce our approval of the instruction as given.

Other assignments of error, in substance present two questions: (1) Whether appellant can recover damages occasioned by loss of anticipated profits, and (2) whether he can recover damages occasioned by loss of time, and for necessary disbursements. The trial judge at first held he could recover for loss of anticipated profits only, and that the con-

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tract, being one for a partnership which could be terminated at any time after the business had actually been installed, appellant's claim for lost profits should be confined to those that might have been earned during the year 1908. He further held appellant could not recover for loss of time, or for expenses incurred. As before stated, a verdict was returned for \$8,000; but later the trial judge sustained respondents' motion for judgment *non obstante veredicto* on the theory that no valid contract had been shown. We conclude that he erred in sustaining the motion, and also erred in the theory upon which he tried the case.

There was sufficient evidence to be submitted to the jury upon the issue whether there was a definite, certain, and binding contract, and the jury upon such evidence which was properly submitted found a valid contract had been made. We hold that, under the contract here involved, appellant was not entitled to recover damages for loss of anticipated profits. The contract contemplated the establishment of a future business in a remote and sparsely settled country, under dangerous and adverse conditions. It did not pertain to any existing business. Any loss of profits would necessarily mean the loss of such anticipated profits as might possibly be earned in the future from a business not yet created, installed or conducted. There was no going business which had previously earned profits sufficient to form a basis upon which to estimate probable future profits. Evidence offered to show a loss of profits in this action would necessarily consist of opinions of witnesses, uncertain and speculative in character. Who could anticipate or foretell that circumstances or contingencies might not have arisen after the business had been actually installed which would result in a total failure to earn any profits whatever? It is common knowledge that parties expecting profitable results frequently enter upon business enterprises which terminate in failure. This court, in common with others, has held that

loss of profits, under certain conditions, may be the basis of a recovery in actions for damages, and appellant has cited the following cases from this court in support of that rule: *Skagit R. & Lum. Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; *Federal Iron and Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418; *Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174; *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. 1059.

The first three cases cited, either award damages for actual losses which were not in the nature of profits, or disclosed an established business which presented facts and practical experience upon which an estimate of lost profits could be intelligently predicated. In the *Church* case, a recovery was allowed only for commissions on sales shown to have been actually made. An examination of the authorities will show that the courts, with marked uniformity, have announced the doctrine that, where an established business has been interrupted or destroyed by breach of contract, or by tort, a resulting loss of profits may become the basis of a recovery, there being a past experience sufficient to render the extent of such loss reasonably certain, and fairly susceptible of proof. *Bogart v. Pitchless Lumber Co.*, 72 Wash. 417, 130 Pac. 490. The cases from this court cited by appellant, where the loss of profits was involved, are in harmony with this rule. The doctrine is equally well established that a loss of prospective profits will not become a basis of recovery in an action upon the breach of a contract to launch a new venture or business.

"Where a profit has actually been made, this may be proved as very pertinent to the question what the future profits would probably have been had not the business been interrupted, and as a material aid to the jury in the solution of this question; but where no profit has ever been realized, the mere loss of an opportunity to try to make a profit is of too uncertain value to be compensated." 1 Sedgwick, Damages (9th ed.), § 193.

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Counsel cite and especially rely upon *Dennis v. Maxfield*, 10 Allen 138, to sustain appellant's right to recover for loss of prospective profits herein. Commenting on that case, Mr. Sedgwick, in his work on damages, immediately after the quotation above made, further says:

"In *Dennis v. Maxfield* the plaintiff was hired for a whaling voyage, and was to receive a certain 'lay' or percentage of the profits, and additional compensation if the cargo reached a certain amount. Being wrongfully dismissed, it was held he could recover compensation for both items of loss, the voyage having ended and the profits of the voyage being known. . . .

"This, it must be noted, is a contract where the profits are those of a business, not the profits of the plaintiff's individual exertions. He may in such a case wait until the business is completed and the profit realized, and then recover his proportion, as he did in the case just cited; or if the business has been so long established that he can reasonably prove that a profit will be realized, he may recover at once upon the breach. But if it is a new enterprise, and there is no proof that profit will be made, the plaintiff can prove no loss and should recover no damages on account of the loss of profits; the burden of proving a profit is upon him."

This rule is well sustained by authority. *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96; *Paola Gas. Co. v. Paola Glass Co.*, 56 Kan. 614, 44 Pac. 621, 54 Am. St. 598; *Winslow Elevator & Machine Co. v. Hoffman*, 107 Md. 621, 69 Atl. 394, 17 L. R. A. (N. S.) 1130.

"Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation." 13 Cyc. 59.

"The loss of profits to a business which has been wrongfully interrupted by another is an element of damage for which a recovery may be had; but it must be made to appear that the business was an established one—that is, that it had

been successfully conducted for such a length of time and had such a trade established that the profits thereof are reasonably ascertainable." *States v. Durkin*, 65 Kan. 101, 68 Pac. 1091.

A clear distinction is manifest between an interruption of, or an injury to, an existing business which has been successfully conducted for a considerable period of time, and the prevention of the establishment of an entirely new business. When the business is in contemplation, but not established, profits that may be anticipated therefrom are too speculative, uncertain, and conjectural to become a basis for the recovery of damages in an action for the subsequent loss of such profits.

As there was evidence sufficient to sustain the finding of the jury that a valid and definite contract had been entered into between appellant and respondent Beau; and as, under the rule heretofore announced, appellant cannot recover damages for the loss of prospective profits, it necessarily follows that he is entitled to recover such losses as he actually sustained in the way of expenses incurred in performing his part of the agreement, and for loss of time while thus engaged. This was the view entertained by the court on the first trial when appellant was ordered to remit a considerable amount of the verdict, or submit to a new trial, and is the theory upon which the case must be again tried.

Upon the last trial, there was an absolute failure of evidence sufficient to show that the defendant H. T. Harding was a party to the contract, or that he had authorized the respondent Beau to act for him when entering into the contract. As to the defendant Harding, the judgment of dismissal was properly entered. As to the respondent Beau, the judgment is reversed, and the cause is remanded for a new trial upon the issues joined between him and the appellant. The appellant will recover his costs in this court from the respondent Beau.

MOUNT, PARKER, GOSE, and CHADWICK, JJ., concur.

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Opinion Per Curiam.

[No. 11631. Department One. January 21, 1914.]

C. R. PIERCE, *Appellant*, v. JOHN R. MITCHELL, *as Judge*,
et al., Respondents.¹

FALSE IMPRISONMENT—ACTION—DEFENSES—JUDGMENT OF CONVICTION—ACQUIESCENCE IN. An action for false imprisonment under a judgment and conviction for contempt cannot be maintained where plaintiff took no appeal from the judgment or sought to review it in any way, but confessed its validity by paying the fine imposed.

Appeal from a judgment of the superior court for Thurston county, Albertson, J., entered February 26, 1913, dismissing an action for false imprisonment, upon motion for judgment on the pleadings. Affirmed.

Cecil R. Pierce, pro se.

Thomas M. Vance and John M. Wilson, for respondents.

PER CURIAM.—The plaintiff in this action, on information filed by the former prosecuting attorney of Thurston county, was cited to appear in the superior court for that county for an alleged contempt of court committed by the writing of a letter to the judge of that court containing scandalous and contemptuous matter touching a cause therein pending. He was tried, convicted and sentenced to pay a fine of \$50 and costs, and was, by the court, remanded to the custody of the sheriff until the same should be paid. After remaining in jail for a few days, the defendant in that action, plaintiff here, paid his fine and costs and went his way. No appeal was taken from that judgment and, on the record, its legality therefore stands confessed. Some months after his discharge, the plaintiff brought an action against the presiding judge who sentenced him and the sheriff who carried out the sentence, claiming damages for his conviction, sentence and imprisonment in the sum of \$10,000.

¹Reported in 137 Pac. 1008.

We find it unnecessary to review the pleadings in this case further than to say that the complaint seeks to allege the facts as constituting false imprisonment, and the answer sets up in justification the judgment of contempt, the payment of the fine and the fact that no appeal was ever taken from the judgment. The fact of payment, the reply admits. Upon the record so constituted, the defendants moved for judgment on the pleadings. The motion was heard before Honorable R. B. Albertson, presiding judge, all parties being present by counsel. The motion was granted, and the action was dismissed with costs.

It is obvious that, if the appellant was legally convicted and imprisoned in the contempt proceeding, neither the judge who pronounced the sentence, nor the sheriff who carried it out, can be made to respond in damages for so doing. The plaintiff, never having appealed from the conviction in the contempt proceeding, and never having sought to review that proceeding by *habeas corpus* or otherwise, but having, in effect, acquiesced therein and having confessed the validity of the judgment by paying the fine, cannot now question its validity or make his imprisonment thereunder the basis of an action for damages.

The judgment is affirmed.

[No. 11241. Department Two. January 22, 1914.]

WASHINGTON WATER POWER COMPANY, *Respondent*, v.
ABACUS ASSOCIATION, *Appellant*.¹

EMINENT DOMAIN — RIGHTS ACQUIRED — RESTRICTION—LIMITATION BY STIPULATION. In proceedings to condemn land along a river, to be flooded by the erection of a dam for a power site, it is not error to allow the petitioners to file a stipulation limiting the proceedings to the acquisition of the right to flood the land, allowing defendants to retain all other rights thereto.

SAME—PROCEEDINGS—PROVINCE OF COURT AND JURY. In proceedings to acquire the right to flood lands by the erection of a dam for a power site, when there is no evidence of damage on account of loss of motive power, or on account of damages to the land not taken, it is not error to withdraw those questions from the jury.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 5, 1912, upon the verdict of a jury rendered in favor of the petitioner, awarding damages in eminent domain proceedings. Affirmed.

Patrick C. Shine and James Z. Moore, for appellant.

Post, Avery & Higgins, for respondent.

MAIN, J.—This action was instituted for the purpose of acquiring title to land under the right of eminent domain.

The petitioner was a public service corporation. The appellant was the owner of a tract of land, consisting of approximately 180 acres, the north boundary of which was the Spokane river. The petitioner sought to condemn a 28-foot strip across the entire tract and adjacent to the river. The object of acquiring the strip of land was that it might be overflowed by the rise of the river on account of the erection of a dam therein, twenty-two miles below the appellant's property, where an electric power plant was installed.

In the petition, it was sought to acquire the entire title to the strip taken; but, when the case was called for trial, the

¹Reported in 137 Pac. 1199.

petitioner offered what it termed a stipulation wherein it declared its intention to be to acquire only the right to flood the land and that the appellant and its successors should retain every other right thereto, such as crossing the same in any manner, erecting or maintaining houses or other structures thereon, the running of pipe lines across or through the same at any point or place that might be desired. Over the objection of the appellant, this stipulation was permitted to be filed. Thereupon the appellant moved for a continuance on the ground of surprise, which motion was denied.

The cause was tried to the court and a jury. After both parties had finished the introduction of evidence, the petitioner moved that all the evidence upon the question of the reduction in the velocity of the stream, and as to the portion of land remaining, be withdrawn from the jury, for the reason that there was no evidence showing either damage on account of loss of the motive power of the stream or of the amount of damages, if any, to the tract of land from which the strip was taken. This motion was sustained by the court for the reasons given.

The question submitted to the jury was the value of the strip taken, and an instruction was given to include in the verdict nominal damages to the remainder, and also nominal damages on account of the reduction in the velocity of the stream. A verdict was returned in the sum of \$18.

Motion for new trial was seasonably made and overruled. Judgment was entered upon the verdict, from which the appeal is prosecuted.

The appellant's brief contains fifty-one assignments of error. To attempt to follow the discussion of these as contained in the briefs would prolong this opinion to forbidden lengths. It is sufficient to say that the record has been carefully read and all the assignments of error have been considered. We do not find in any of them substantial merit.

The judgment will be affirmed.

Crow, C. J., Ellis, Fullerton, and Morris, JJ., concur.

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Opinion Per GOSE, J.

[No. 11449. Department One. January 22, 1914.]

GEORGE E. CULVER *et al.*, *Appellants*, v. CHARLES C.
CULLITON *et al.*, *Respondents*.¹

CONTRACTS—PERFORMANCE OR BREACH—EVIDENCE—QUESTION FOR JURY. In an action for breach of an oral contract, where the testimony was conflicting, plaintiffs claiming that the defendants had sublet them certain railroad concrete work and guaranteed there would be 1,800 yards of it, while defendants claimed that they did not guarantee any amount, but sublet the concrete work on ten miles of road, subject to any change in plans by the company, be the same more or less, and that they had settled with and overpaid the plaintiffs for all the work done, amounting to 119 yards, the questions are for the jury, under proper instructions; nor could the court say, as a matter of law, that defendants' tender of 160 additional yards, which could only be done at a loss, would be a substantial compliance with their contract guaranteeing a balance of approximately 1,700 yards.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 29, 1913, in an action on contract, in favor of the defendants upon a counterclaim, upon withdrawing the case from the jury, after a trial on the merits. Reversed.

Robertson & Miller, for appellants.

Alex M. Winston, for respondents.

GOSE, J.—This is an action for damages flowing from an alleged breach of contract. After all the evidence had been submitted, upon the motion of the defendants, the court withdrew the case from the jury and entered a judgment in favor of the defendants for the amount of their counterclaim. The plaintiffs have appealed.

The complaint, in substance, alleges that the appellants entered into a contract with the respondents, wherein and whereby the appellants agreed to do 1,800 cubic yards of

¹Reported in 137 Pac. 1000.

concrete work for the respondents, on a branch of the Canadian Pacific Railway Company, in British Columbia, at a fixed price per yard; that the respondents agreed to furnish the appellants that amount of concrete work; that the respondents furnished them only 119 yards of concrete work, and failed and refused to furnish them any more work, and that the appellants would have made a profit of \$3.50 per yard. The answer alleges, affirmatively, that the respondents had a contract with the railway company, in British Columbia, whereby they had agreed to do the concrete work and bridging, as per specifications attached to the contract, upon ten miles of the railroad; that, at the time of entering into the contract with the appellants, it was supposed that the amount of concrete work would be approximately 1,800 yards; that they did not agree to furnish the appellants any fixed amount of concrete work, but that they gave the appellants a sub-contract to furnish the material and perform the labor for all the concrete work on the ten miles of railroad; that the appellants commenced work under the contract on the first day of July, 1912, and that, on the 5th day of September following, they abandoned and refused to complete their contract. It is further alleged that the appellants completed 119 yards of the contract, and that the respondents have overpaid them for such work to the extent of \$549.35, for which amount they pray judgment. It is also alleged that the appellants agreed with the respondents that they were indebted to them, and that, as soon as the amount could be ascertained, they would pay it. The new matter in the answer was traversed in the reply.

The appeal presents but one question, viz.: Should the case have been submitted to the jury under proper instructions? We think it should. The appellants, in substance, testified that the contract was verbal; that it was made in Spokane; that the respondents guaranteed that there would be at least 1,800 yards of concrete work; that the respondents later told them that the plans were ready, and requested them to go to

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British Columbia and commence work; that they did so; that, after completing 119 yards, they were informed by the respondents that there was no more concrete work, and that they then went away. The respondents' testimony is to the effect that they did not guarantee any particular amount of work, but that the appellants took a subcontract to do all the concrete work on ten miles of the railroad, should the same be more or less, and that the respondents' contract with the railroad company provided that the plans and specifications were subject to change and modification by the railroad company's engineer, and that the appellants so understood it. The appellants meet this by saying that they made their contract without any reference to the contract between the respondents and the railroad company. They further say that they did not settle the counterclaim which the appellants are asserting, and that they did not agree to pay it. The respondents also claim that, after the appellants went to British Columbia, they prepared duplicate written contracts embodying their version of the contract which they made with the appellants; that they submitted them to the appellants; and that they agreed to, but did not, sign them. All these questions should have been submitted to the jury under proper instructions.

The respondents also assert that when the appellants quit work, they were informed that there were about 160 yards of concrete work, according to the railroad company's plans as modified by its engineer. The appellants meet this by saying that the railroad engineer told them that there might be that amount, and that he also said to them that, under the modified plans, there was practically no concrete work. There seems to be an inconsistency in the testimony of the appellants as to whether they understood before quitting that there were 160 yards of concrete work. The jury should have been called upon to reconcile this seeming inconsistency. It does not present a law question. The rule, however, is that a party must substantially perform his con-

tract. 9 Cyc. 602, 603; *Pallman v. Smith*, 135 Pa. St. 188, 19 Atl. 891.

If it be conceded that the appellants quit work knowing that there were approximately 160 yards of concrete work, which, as they assert, was so situated that a loss would result from doing it, the question as to whether there was a substantial performance of the contract on the part of the respondents is one of mixed law and fact. It certainly cannot be declared, as a matter of law, that the tender of 160 yards of concrete work so situated is a substantial performance of a contract which guarantees a balance of approximately 1,700 yards. All of these questions should have been submitted to the jury under proper instructions.

The judgment is reversed.

Crow, C. J., ELLIS, and MAIN, JJ., concur.

[No. 10813. Department One. January 23, 1914.]

VINCE H. FABEN, *Appellant*, v. B. L. MUIR, *Respondent*.¹

ACTIONS—NATURE—LAW OR EQUITY—JURY—RIGHT TO JURY TRIAL. An action to recover on account for attorney's services, in which the answer called for an accounting and credit for various sums of money received, is properly tried to a jury as an action at law, where the dominant issue presented, both by the pleadings and evidence, was whether or not a definite contract of employment fixed the amount plaintiff was to receive, or whether he was entitled to recover on a *quantum meruit*; the exact amount of money received and the credits to the defendant being conceded.

APPEAL—DECISION—LAW OF CASE—NEW TRIAL—SUFFICIENCY OF EVIDENCE. Where a new trial was granted to defendant because of insufficiency of the evidence to sustain a verdict for the plaintiff, and the order was affirmed on appeal, and upon a retrial upon the same evidence, which was conflicting, a verdict was rendered for defendant, a new trial cannot be granted for insufficiency of the evidence; since the question of the sufficiency of the evidence is foreclosed.

¹Reported in 137 Pac. 1042.

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Opinion Per ELLIS, J.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 21, 1912, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

S. H. Kelleran, for appellant.

Will H. Thompson, for respondent.

ELLIS, J.—This is an action by an attorney at law to recover a balance claimed to be due upon account for professional services. A prior trial resulted in a verdict for over \$700 in the plaintiff's favor. The trial court ordered a new trial on the specific ground that the evidence was insufficient to sustain the verdict. The plaintiff appealed, and this court affirmed that order. *Faben v. Muir*, 59 Wash. 250, 109 Pac. 798. A second trial resulted in a verdict of \$400.31 for the defendant. The plaintiff's motion for a new trial was overruled. From a judgment on the verdict, he again appeals, urging two grounds which he claims entitle him to a reversal, namely: (1) that the respondent's answer called for an accounting and credit for various sums of money received by the appellant as attorney, making the action one of equitable cognizance, triable to the court, and that the court erred in submitting the issues to a jury over the appellant's objection; (2) that, in any event, a new trial should have been granted for insufficiency of evidence to support the verdict.

The appellant brought his action as one at law, but he contends that the nature of the action as one at law or in equity is determined by the substance of the issues as presented by the entire pleadings, and as developed by the proof. As a general rule, this must be conceded on the authorities. Tested even by this rule, however, the record here presents a cause triable by jury. Touching the issues, we said on the first appeal:

"An examination of the evidence discloses, however, that the question of the excessiveness of the verdict was dependent

on the view taken of the question whether there was a contract between the parties fixing the amount the appellant was to receive for his services. If there was such a contract, as the respondent contended, then the verdict was excessive; in fact the verdict should have been in his favor rather than against him. On the other had, if there was no contract, and the appellant should be permitted to recover on a *quantum meruit*, the verdict could be said to be within the evidence introduced to show the value of the services."

Clearly, we then regarded the question as to whether or not there was a contract fixing the amount appellant was to receive for his services as the substance of the issue. The second trial was upon the same pleadings and the same evidence as the first. By stipulation, the evidence introduced at the first trial was read to the jury on the second trial, and constitutes the statement of facts on this appeal. Upon this unchanged record, we still regard the dominant issue presented, both by the pleadings and by the evidence, as simply this: Was there a definite contract as to the amount appellant was to receive for his services, or was he entitled to recover on a *quantum meruit*? As to the amount of the moneys which had come into the appellant's hands, for which he must account, and to which the respondent was entitled to credit, there was no serious controversy. In his brief, discussing the sufficiency of the evidence, the appellant now admits this, using the following language:

"From the pleadings and proof, the parties seemed to be agreed as to the exact amount of money which had come into the plaintiff's hands, and to which defendant was entitled to credit, viz., \$1808.91."

This concession, which the respondent accepts and which the record necessitates, negatives the assumption that there was any such question of an accounting presented by the answer as to make the action one essentially cognizable in equity. The court committed no error in submitting the cause to the jury.

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Nor did the court err in refusing a new trial. As pointed out in our former opinion, the evidence was sharply conflicting. Upon a re-examination of the same evidence, we are still of the same opinion. This phase of the case is ruled by our decision in *Thomas & Co. v. Hillis*, 70 Wash. 53, 126 Pac. 62. We there held, where a new trial was granted because the evidence was insufficient to sustain a verdict for the defendant, and the order was affirmed on appeal, that, upon a retrial of the same case upon substantially the same evidence, which was conflicting, it was an abuse of discretion to set aside a verdict for the plaintiff as not sustained by the evidence. Under this rule, it would have been positive error to grant a new trial upon the record before us. Here the evidence was not only substantially the same, but identically the same on the second trial as on the first. In *Thomas & Co. v. Hillis*, we said:

"The evidence being conflicting, and it being held by one judge and one jury that its weight is with the plaintiff, and another judge and a jury having held that weight to be with the defendants, there must be evidence to sustain a verdict one way or the other, and there being no error of law to compel a new trial, we are of the opinion that it was an abuse of discretion on the part of the trial judge to set aside a verdict rendered upon a second trial upon the ground of insufficiency of the evidence."

The case here presented invokes the rule there announced even more emphatically. Here two judges and one jury have held, upon the same record, that the weight of the evidence was with the defendant. The verdict of one jury to the contrary was set aside by the trial court, and we sustained his action on the former appeal. If there is ever to be an end of this litigation, there must be a time, as was said in the *Thomas* case, "when the question of the insufficiency of the evidence to sustain a verdict is foreclosed."

The judgment is affirmed.

CROW, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[No. 11159. Department Two. January 23, 1914.]

THOMAS FREEBURY *et al.*, Respondents, v. CHICAGO,
MILWAUKEE & PUGET SOUND RAILWAY COMPANY
et al., Appellants.¹

MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—INDEPENDENT CONTRACTORS—EXPLOSIVES. A railroad company employing an independent contractor to excavate in a public street in the business section of a populous city by blasting with dynamite, is liable to third persons through the negligence of the contractor in blasting; since the work is inherently and intrinsically dangerous, liability for which cannot be evaded by entering into an independent contract.

APPEAL—REVIEW—VERDICT. A verdict will not be set aside as excessive where the evidence was conflicting and there is substantial evidence to sustain the amount.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 16, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries caused by blasting in excavation work in a street. Affirmed.

F. M. Dudley and Cullen, Lee & Hindman, for appellants.

W. H. Plummer and Henry Jackson Darby, for respondents.

MAIN, J.—This action was instituted for the purpose of recovering damages on account of personal injuries.

On June 14, 1910, the city council of the city of Spokane passed an ordinance granting to the Chicago, Milwaukee & Puget Sound Railway Company a franchise for the operation of a railway upon certain streets and alleys as specified. Subsequently the franchise was accepted by the railway company. On February 23, 1911, the franchise ordinance was amended. The amendment provided for the change of the established grade of a portion of Division street, extending

¹Reported in 137 Pac. 1044.

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between the Great Northern Railway tracks and Main avenue. By section 9 of the franchise, as amended, the railway company, at its own expense, was required to make and complete the changes of grade provided for in Division and other streets.

On July 15, 1911, the railway company contracted in writing with Bates & Rogers Construction Company for doing certain of the regrade work in the streets affected. This contract provided that, in blasting for the removal of rock or other material, Bates & Rogers Construction Company should use the greatest care and precaution for the purpose of protecting the safety of persons and property. The contract also provided a classification for solid rock excavation and fixed a price for the same.

On May 17, 1912, the Bates & Rogers Construction Company sublet the doing of a portion of the work to Breen & Johnson. This contract was approved by the chief engineer of the railway company. The Breen & Johnson contract provided that they should furnish all the labor for doing the work on Division street within certain specified limits.

On May 31, 1912, while Breen & Johnson were excavating for a sewer trench or tunnel in Division street, near the intersection of Main, and blasting with dynamite, a blast was discharged, and a stone, weighing approximately 20 or 25 pounds, was hurled a distance of 100 feet, striking the window casing of a window on the second floor of the Station hotel, and rebounded into the room thereof, striking the plaintiff and causing the injury complained of.

Division street, at the point where the blasting was being done, was in the business section of the city. The buildings on either side thereof were from one to three stories in height, and were used for stores, hotels, and lodging houses.

The rock mentioned struck the plaintiff, Allie Freebury, in the region of the left shoulder blade. She was thrown from the chair in which she was sitting and across the room, rendered unconscious, and sustained serious injury. The present

action was begun for the purpose of recovering damages for the injuries sustained.

The cause came on for trial before the court and a jury on October 15, 1912. At the close of the plaintiffs' case, each of the defendants challenged the legal sufficiency of the evidence and moved the court for a judgment of dismissal. This motion was overruled. After all the evidence had been introduced, the defendants again moved the court for a dismissal of the action. These motions were likewise overruled. The court, in submitting the matter to the jury, instructed that both the Bates & Rogers Construction Company and Breen & Johnson, under their respective contracts, were independent contractors. The jury returned a verdict in favor of the plaintiffs in the sum of \$12,000. Motion for a new trial was seasonably made and overruled. Judgment was entered on the verdict. The defendants have appealed.

The principal question is the liability of the railway company and the Bates & Rogers Construction Company. That Breen & Johnson could be held to respond in damages is conceded. But it is claimed that, since they were operating under an independent contract, they alone are liable.

The general rule is that, where an individual or corporation contracts with another individual or corporation exercising an independent employment, the employer is not liable for the wrongful or negligent acts of the contractor or of his servants, employees, or agents. In *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6, this proposition is stated in this language:

"Where an individual or corporation contracts with another individual or corporation, exercising an independent employment, for the latter to do a work not in itself unlawful or attended by danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the contractor's servant. [Citing cases]."

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But this general rule is subject to well settled exceptions. One of these is that, where the work to be done is inherently or intrinsically dangerous in itself, and will necessarily or probably result in injury to third persons unless measures are adopted by which such consequences may be prevented, an employer cannot evade responsibility by entering into an independent contract with another person for the doing of the work. In *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 810, it is said:

“Where the work is inherently or intrinsically dangerous in itself and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented, and in other like cases, a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work.”

Whether the work of blasting falls within this exception depends upon the facts and circumstances that may attend each individual case. And it has been held that, where the employer contracted for the construction of a railroad grade in the Cascade mountains, far removed from any human habitation, the rule of nonliability applies. In *Kendall v. Johnson, supra*, it was further said:

“The work of blasting may or may not fall within the exceptions to the general rule, according to the particular circumstances of the individual case, but under the facts here presented, where the parties were employed to construct a railroad grade in the Cascade mountains far removed from any human habitation, we think the general rule of nonliability applies.”

In the present case, the contract called for the digging of a tunnel or trench in the business section of the city of Spokane, and the rule applicable to a situation far removed from human habitation cannot be invoked. This case falls squarely within the exception that the work was inherently dangerous in itself, and would necessarily or probably result in injury to third persons unless measures were adopted to prevent such consequences.

It is contended, also, that the verdict is excessive. A verdict of \$12,000 seems large, and were we to weigh the conflicting evidence upon the extent of the injury sustained, we might reach a different conclusion. A careful reading of the record demonstrates that, if the injuries sustained by the respondent Allie Freebury were as serious and permanent as the evidence introduced on the part of the respondents would tend to show, then the verdict is not excessive. If, however, the extent of her injuries are correctly set forth in the evidence introduced on behalf of the appellants, the amount of the verdict should not be sustained. Upon this conflicting evidence, the jury apparently believed the witnesses for the respondents.

Where the evidence as to the extent of the injuries is conflicting, and there is substantial testimony which sustains the amount of the verdict, the finding of the jury must control. If the verdict is not sustained by substantial evidence, then a reduction of the amount thereof will be ordered or a new trial granted. In the recent case of *Frostman v. Stirrat & Goetz Inv. Co.*, 76 Wash. 592, 136 Pac. 1144, speaking on this question, it was said:

"It is next urged that the verdict of \$10,000 was excessive. Unfortunately there was much dispute and contradiction between the medical men as to respondent's present condition. Those testifying for respondent said his injuries were severe and permanent, while appellant's witnesses were of the opinion that respondent was a malingerer. Whatever our opinion may be of the fact, we cannot usurp the function of the jury and say that they have erroneously decided a question of fact. If there was no dispute as to respondent's physical condition, we could say whether or not, in our judgment, the damages allowed were more than compensatory, and under such circumstances appellate courts frequently do say that verdicts are excessive. But where there is a sharp conflict as to the damages sustained, the verdict becomes a finding of fact which we are not at liberty to disturb, unless we could say, assum-

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ing the theory of respondent as to the extent and nature of the injuries to be correct, the amount awarded is excessive."

The judgment will be affirmed.

Crow, C. J., ELLIS, FULLERTON, and MORRIS, JJ., concur.

[No. 11178. Department Two. January 23, 1914.]

C. W. ALLEN *et al.*, *Appellants*, v. THE CITY OF BELLINGHAM
et al., *Respondents*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROCEEDINGS—RESOLUTIONS—SUFFICIENCY. A resolution for a sewer improvement, stating an intention to improve a certain portion of a designated street by the construction of a trunk sewer outlet at an estimated specified cost, that the cost is to be assessed against the property which can be conveniently drained into the sewer and included in an assessment district thereafter to be established, and the time and place for making protests, substantially complies with a charter provision requiring the resolution to state the nature of the improvement, the estimated costs, the portion of the cost to be borne by benefited property, and the time and place for presenting protests.

SAME—RESOLUTION—OBJECTIONS—JURISDICTION. Where an opportunity is given to present objections to an assessment roll, the failure of the initiatory resolution to meet all the requirements of the law, if the same might have been dispensed with by the legislature, does not defeat the jurisdiction of the council to levy the assessment.

SAME—REASSESSMENT—BAR—JUDGMENT AVOIDING ORIGINAL ASSESSMENT. A judgment declaring an assessment roll void, is not *res judicata* of the right to make a reassessment, so as to bar a reassessment, which is expressly authorized by 3 Rem. & Bal. Code, § 7892-21.

SAME—ASSESSMENT—REJECTION—EFFECT—POWER TO REASSESS. The making of a reassessment roll, which was rejected by resolution and a new roll directed, does not exhaust the power of the council to proceed under the reassessment ordinance; the power not being exhausted until a roll had been prepared and confirmed or the ordinance repealed.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered December 2, 1912, dismissing.

¹Reported in 137 Pac. 1016.

sing an action to enjoin an assessment, upon sustaining a demurrer to the complaint. Affirmed.

Black & Black, for appellants.

Dan F. North and *Walter B. Whitcomb*, for respondents.

MAIN, J.—This action was brought for the purpose of enjoining the collection of certain reassessments for local improvements.

On May 25, 1908, the city council of Bellingham passed a resolution declaring its intention to construct a trunk sewer outlet on "C" street, between Holly and Laurel streets, and do such other work as might be necessary in connection therewith. This resolution reads as follows:

"Whereas, it is necessary to improve "C" street from Holly street to Laurel street by the construction of a trunk sewer outlet, and doing such other work as may be necessary in connection therewith at a total estimated cost of twenty-two thousand two hundred and fifty-two dollars and sixty-one cents (\$22,252.61) and in accordance with the plans and specifications prepared therefor and now on file with the comptroller, which cost it is proposed to assess against the property which can be conveniently sewered or drained by said trunk sewer and included in an assessment district hereafter to be established according to law.

"It is further hereby resolved that all persons interested desiring to make protests against the said improvement may file their protests at any time before 8 o'clock P. M. Monday, June 8th, 1908, in the office of the city comptroller.

"It is further hereby resolved that the manner of making said improvement and the method of payment therefor and all protests against the same will be considered at a regular meeting of the city council to be held in the council chambers at the city hall at the hour of 8 o'clock P. M. of said Monday, June 8, 1908, at which time and place all persons desiring to be heard are hereby notified to be present."

On June 15, 1908, in pursuance of the intention declared in the resolution, ordinance No. 871 was passed, which provided for the construction of the sewer outlet and for the

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levying and collection of a special assessment to pay for the same. Subsequently, the sewer was constructed and the assessment roll prepared. Thereafter and on January 21, 1910, the Bellingham Bay Land Company, W. R. Moultray, John Siegfried and Thos. W. Miller, all of whom are appellants in this action, instituted an action in the superior court for Whatcom county to enjoin the collection of the assessment. Judgment was rendered vacating, setting aside and holding void the assessment. On April 10, 1911, ordinance No. 1587 was approved, which provided for a reassessment of the property benefited by the construction of the sewer in "C" street between Holly and Laurel and the doing of such other work as was necessary in connection therewith, and created an assessment district. Thereafter the board of public works of the city of Bellingham prepared an assessment roll, and notice was published that a hearing would be had upon the same on November 20, 1911. This roll was not approved by the city council, and a resolution was passed directing that a new roll be prepared. A new roll was prepared, and on March 18, 1912, was confirmed by the city council. No claim is made that an opportunity was not given to make objections to this roll and to have a hearing thereon.

The present action was instituted for the purpose of restraining the collection of the assessment made in the reassessment roll of March 18, 1912. The complaint is voluminous, but the facts stated are sufficient for an understanding of the questions which are presented. To the complaint, a demurrer was interposed and sustained. The appellants elected to stand upon their complaint, and refused to plead further. Judgment was entered dismissing the proceeding, from which an appeal is prosecuted.

The principal contentions of the appellants are, first, that the city council had not acquired jurisdiction to make the reassessment in question; second, that the former proceeding in which the original assessment was held to be void was *res judicata* as against the right to reassess; and third, that, in

any event, the reassessment could not be made under ordinance No. 1587 after the council had rejected the first roll prepared thereunder and by resolution direct the making of a new roll.

I. It is earnestly contended that the resolution above set out declaring the intention to make the improvement was not sufficient to confer jurisdiction, and therefore the reassessment was made without due process of law.

Section 327 of the city charter, being one of the sections in which the city is empowered to provide sewerage, requires that:

"All proceedings for the assessment of drainage or sewer districts or sub-sewer districts, shall, as far as practicable, conform to the methods herein prescribed for the establishment of street improvement districts."

Section 299 of the charter, being one of the sections covering the matter of street improvements, provides:

"No ordinance providing for the improvement of any street, avenue, public way or alley shall be passed without the publication of the resolution declaring the intention of the city to make such improvement and not until the expiration of at least ten days from the date of the first publication of such resolution. Such resolution of intention so to improve shall contain, among other things, a statement of the nature of the proposed improvement, and the estimate of the cost of the same, and the portion of the cost of the same which is to be assessed against the property abutting (and included in the assessment district provided by such resolution) on such street or alley proposed to be improved, and shall designate a time, not less than ten days, in which protests against the proposed improvements may be filed in the office of the city clerk . . ."

It will be noted that, by this section of the charter, a local improvement is to be initiated by resolution declaring it to be the intention of the city to make such improvement. The requirements of the resolution as therein specified are: (a) the statement of the nature of the proposed improvement; (b) the estimated cost thereof; (c) the portion of the

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cost that is to be borne by the property benefited and included in the assessment district; and (d) shall designate a time and place at which protests against the improvement may be presented.

The resolution in question specifies, (a) an intention to improve "C" street from Holly street to Laurel street by the construction of a trunk sewer outlet, and to do such other work as may be necessary in connection therewith; (b) the estimated cost to be \$22,252.61; (c) the cost of the improvement to be assessed against the property which can be conveniently sewered or drained by such trunk sewer and included in an assessment district to be thereafter established; and (d) a time and place for the making of protests against the proposed improvement was fixed.

When the matters covered by the resolution are compared with the charter requirements, it appears that there is a substantial compliance therewith. While the resolution may not be artfully drawn, it is sufficiently clear to make manifest that the proposed improvement was for sewer construction, rather than primarily the improvement of a particular street. It would be difficult for one reading the resolution to misconceive its purpose. But if it were assumed that the resolution were insufficient, it would not necessarily follow that the reassessment would be void.

There is no constitutional requirement which makes it necessary that notice of a proposed improvement be given by resolution or otherwise. The legislature would have had the power to have dispensed with such a notice. Where an opportunity has been given to present objections to a reassessment roll, a failure on the part of the taxing officers to initiate the improvement by a proper resolution does not avoid the assessment if the requirement of the law which was not observed was one which the legislature might have dispensed with. *Rucker Bros. v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582; *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010. As already stated, in the present case

there is no claim that an opportunity was not given to present objections to the reassessment roll which is attacked by this proceeding.

II. It is argued that, since three of the appellants here brought a proceeding against the original assessment roll and had it declared void, the judgment there is *res judicata*, and no right existed to make the reassessment. But we think this contention cannot be sustained. The roll here involved is not the same roll as was involved in the former proceeding. The statute authorizes a reassessment. Laws of 1911, p. 452, § 21 (3 Rem. & Bal. Code, § 7892-21). To deny the right to reassess would be to withhold a power which is conferred by this act of the legislature. In *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448, the court speaking of the effect of a judgment declaring the original assessment roll void as against the right to subsequently assess, said:

"The cases brought under the old assessment above referred to are not *res adjudicata*, for the reason that the old assessment is superseded by the reassessment. Those cases had reference to the old assessment, and were *res adjudicata* as to the questions raised therein; but they are not so as to the reassessment, further than a payment under the old assessment becomes by the ordinance a payment *pro tanto* under the reassessment . . ."

III. After the decree was entered in the former action, holding that the original roll was void, the city council passed Ordinance No. 1587, which provided for the making of a reassessment in pursuance of this ordinance. The board of public works prepared a proposed roll and submitted the same to the city council. This was rejected by resolution and a new reassessment directed. It is claimed that, after the submission of the first reassessment roll prepared by the board of public works, the power to proceed under the ordinance directing the same was exhausted, and that a further reassessment could not be made without the passage of a new ordinance. But obviously the power to proceed under the reassessment ordinance could not be exhausted until a roll

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had been prepared and confirmed by the council or the ordinance repealed. The proposed roll had no validity or effect until confirmed. The right to reject is reposed in the council by the statute. Laws of 1911, p. 452.

Finding no error, the judgment will be affirmed.

Crow, C. J., Ellis, Morris, and Fullerton, JJ., concur.

[No. 11216. Department Two. January 23, 1914.]

W. D. CHAPMAN, *Appellant*, v. HENRY T. HILL,
Respondent.¹

SPECIFIC PERFORMANCE—DEFENSES—FALSE REPRESENTATIONS—MATERIALITY—RELIANCE UPON. Specific performance of a contract for the exchange of property will not be decreed where the contract was induced by plaintiff's false representations that there was nothing but interest due on two mortgages, which did not fall due for two years, when the mortgages were given to secure installment notes for \$1,000 falling due the same year and following years; the same being false representations of material facts peculiarly within the plaintiff's knowledge, and not readily ascertainable by the defendant; especially where plaintiff knew defendant would make no personal investigation.

SAME—RIGHT TO RELIEF—PARTIES—COMMUNITY PROPERTY. Specific performance of a contract to convey the community property of the defendant will not be decreed where defendant's wife was not a party to either the contract or the action.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered November 8, 1912, dismissing an action for specific performance, after a trial on the merits to the court. Affirmed.

John C. Hurspool, for appellant.

Dunphy, Evans & Garrecht, for respondent.

¹Reported in 137 Pac. 1041.

MORRIS, J.—Action for the specific performance of a contract for the exchange of real estate. The contract was made in this state, on May 31, 1912, and covered lands of appellant situate in Oregon, and lands of respondent situate in Oregon and Washington. The action was resisted on two grounds: (1) misrepresentations as to the maturity of two mortgages upon appellant's lands, one for \$3,600, the other for \$1,000; and (2) that the land in this state was the community property of respondent and his wife, who was a party to neither the contract nor the action. The court below, without making findings, dismissed the action.

The judgment of dismissal must be sustained upon both grounds. We find that appellant represented to the respondent, to induce him to enter into the contract, that only \$500 interest was then due upon the two mortgages, and that the mortgages themselves would not be due for two years; while, as a matter of fact, the mortgages were given to secure installment notes, one of which for \$1,000 was due in October, 1911, and still unpaid; another for \$1,000 would become due in October, 1912; a third in October, 1913, and the remaining \$600 of the \$3,600 mortgage would become due in October, 1914. Both of these mortgages were held by nonresidents of this state. Here we have a false representation of an existing and material fact, the truth or means of knowledge of which was peculiarly within the knowledge of one party, and the opportunity of ascertaining the true facts, not readily ascertainable, to the other, together with the knowledge by one party that the other did not intend to make a personal investigation but relied absolutely on the truth of the facts communicated to him. These facts vitiated the contract and rendered it unenforceable. *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289; *Conta v. Corgiat*, 74 Wash. 28, 132 Pac. 746; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186; *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172.

Having reached this conclusion, it is unnecessary to discuss the second point relied upon to sustain the judgment,

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other than to say it is well taken. *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499.

The judgment is affirmed.

CROW, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 11240. Department One. January 23, 1914.]

J. B. SLEDGE *et al.*, *Appellants*, v. ARCADIA ORCHARDS
COMPANY, *Respondent*.¹

DAMAGES—CONTRACT—BREACH—STIPULATED DAMAGES OR PENALTY. An agreement for stipulated damages for breach of a contract cannot be sustained, except as a penalty authorizing recovery only of pecuniary damages actually sustained, where it provided that \$60 per acre was to be paid plaintiff for each acre of a hundred acre tract which the plaintiff failed, (1) to plant to apple trees in the spring of 1912 as early as the weather would permit, (2) to plant to a cover crop between the rows, and (3) to care for the trees after planting; since the same sum was to fall due for a minor or partial default as for a total default, and also on default in any one of the three particulars, all of which were of different degrees of importance, and could not be the proper subject for stipulated damages in the same amount, making the damages stipulated for unreasonable in relation to the gravity of the default for which they were to compensate.

CONTRACTS—PERFORMANCE OR BREACH—DEFAULT—WAIVER. A provision for stipulated damages in case of a default in a contract to plant a tract of land to apple trees as early in the spring of 1912 as the weather will permit, and to plant a cover crop between the rows at the same time, is waived, where the plaintiff, after commencing suit on the default May 13, at which time planting had not commenced, wrote a letter to defendant on May 20th, knowing that work was in progress (planting being finished June 8), that it would be satisfactory if the cover crop were planted by September 1st; since an offer and acceptance of part performance prevents recovery of liquidated damages.

CONTRACTS—BREACH—ACTIONS—DAMAGES—PENALTY—OFFER OF PROOF—SUFFICIENCY. In an action to recover on a penalty for a breach of contract to plant one hundred acres of land to apple trees in the spring of 1912 as early as the weather will permit, in which it appeared that the land was covered with stumps and brush when

¹Reported in 137 Pac. 1051.

the contract was made Nov. 11, 1911, and little of the work of clearing and plowing could be done in the winter, and that the planting was completed June 8th, an offer to prove by an expert that the planting season was usually from April 1st to the middle or last of May, and that trees planted later would be retarded in bearing for one year, is insufficient as an offer to prove pecuniary damages; since it did not tend to show a breach of the contract, which was substantially performed, and was not followed by offer of proof of the amount of the pecuniary damages sustained.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 16, 1912, dismissing an action on contract, tried to the court, upon granting a nonsuit. Affirmed.

John T. Mulligan, Neil C. Bardsley, and H. N. Martin,
for appellants.

Cullen, Lee & Hindman, for respondent.

ELLIS, J.—In this action, the plaintiff sought to recover from the defendant the sum of \$6,000, as liquidated damages for alleged breach of a written contract. In the contract, which is attached to the complaint as an exhibit, the defendant is designated as party of the first part, and the plaintiff as party of the second part. It was dated November 1, 1911, and, omitting formal parts and signatures, reads as follows:

“(1) The party of the first part, for and as part consideration for the dismissal by plaintiff of cause No. 78632, in the superior court of the state of Washington for King county, J. B. Sledge, plaintiff, vs. Arcadia Orchards Company, a corporation, defendant, and an extension of time to the first party in which to plant said second party's land to apple trees, hereby covenants and agrees to plant to apple trees two years old in the fall of 1911 the entire 100 acres of land described and mentioned in a certain contract between the parties to this agreement, dated December 20, 1909, requiring the first party to plant said land to apple trees and to plant all of said land to a cover crop between the rows of said trees which shall be in the judgment of A. G. Craig, horticulturist for the first party, of the greatest advantage to said land, as early as the weather will per-

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mit in the spring of 1912, and to properly care for said apple trees according to the terms of said contract, which is hereby expressly continued in full force and effect and to which this agreement is supplemental; and if the first party shall fail to plant all or any portion of said land to apple trees two years old in the fall of 1911 or properly care for said trees or plant said cover crop as soon as said trees have been planted, or fail to perform any and all of the covenants and agreements entered into by the first party, the first party shall and it hereby expressly covenants and agrees to pay said second party \$60 for each acre of said land remaining unplanted after the time herein specified for planting said land in the spring of 1912, and said sum shall become due and payable and the first party hereby agrees to pay the same to said second party upon default by the first party; and the first party hereby further agrees to pay said second party \$60 for each acre of said land remaining unplanted at the close of each planting season after the time herein specified for said land to be planted in the spring of 1912, which sum or sums shall become due and payable to said second party immediately upon said default by the first party, as liquidated damages, and if the first party shall fail to properly care for said trees after the same are planted it hereby expressly agrees to pay said second party \$60 for each acre of said land on which said trees are not properly cared for, and the first party hereby expressly covenants and agrees with said second party the payment of said liquidated damages for and on account of the breach of this agreement on its part as herein specified according to the number of acres of said land remaining unplanted after and including the spring of 1912, represents and is a just amount to be allowed said second party for damages said second party will suffer on account of any default on the part of the first party to fully and promptly perform any and all of the covenants and agreements herein specified by it to be performed on the dates herein specified.

“(2) The party of the second part, for and in consideration of the covenants and agreements herein made and entered into by the first party hereinbefore mentioned and the prompt performance of said covenants and agreements by said first party, hereby covenants and agrees to and does give said first party an extension of time from the fall of

1911, which is the latest date said first party has to plant said land belonging to the second party under the terms of said contract dated December 20, 1909, which contract and all rights thereunder is expressly reserved by the second party, in which to plant said 100 acres of land purchased by the second party from said first party to apple trees two years old in the fall of 1911, to as early as the weather will permit said first party to plant said land in the spring of 1912, upon the express condition said first party will pay the second party all sums due as liquidated damages for default on the part of said first party to perform any of the covenants and agreements herein specified to be performed by said first party promptly as soon as said first party shall be in default in the performance of any of said covenants and agreements, and the second party grants to said first party the right to harvest the cover crop to be planted between the rows of trees on said land if said first party shall so desire and proceed to harvest said crop."

The complaint was verified on May 13, 1912, and alleged that at that time no trees had been planted; that the season for planting, according to the terms of the contract, has passed, and that, by virtue of the terms of the contract, this constituted a breach, entitling the plaintiff to \$6,000 damages as therein provided. The answer denied generally the allegations of the complaint, but on the trial the defendant admitted the execution of the contract. The cause was tried to the court without a jury. The evidence adduced by the plaintiff tended to establish the following facts: When the contract was made, the land in question, though it had been logged off in prior years, was densely covered with small trees, underbrush and large stumps. Both parties knew that the land had to be cleared of trees and underbrush, the stumps blown out and the brush and stumps piled and burned before the land could be plowed and prepared for planting to trees. It fairly appears that the land could not be cleared to any advantage during the winter season, though the plaintiff did testify that, in his opinion, some of the clearing might

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have been done after November 1, 1911, when the contract was made. It appears that the clearing was commenced sometime early in the spring of 1912, and prosecuted as rapidly as possible, the plaintiff Sledge testifying that he visited the land on May 5, 1912, when he found men working all over the place; that the underbrush had all been cleared off and burned; that twenty acres had been fully cleared and the stumps piled; that, on another twenty, the piling of the stumps was going on, while on another twenty, stumps were being blown out preparatory to piling and burning. Plowing was commenced on other land belonging to the defendant on March 27, and progressed as steadily as the weather would permit, the plaintiffs' land being reached on May 13, between which time and June 8, it was all plowed and set out to apple trees. There was evidence to the effect that, had the plaintiffs' land been cleared before the spring of 1912, the weather conditions were such that plowing could have been commenced thereon about April 18. Sledge testified that he visited the land again on May 12, the day before the plowing began, and on the next day, began this action. The evidence makes it clear that he knew that the work was in progress when the action was commenced, and that the defendant was intending to prosecute the work and plant the trees, since, after suit was commenced, he wrote the defendant, under date of May 20, 1912, a letter as follows:

"Arcadia Orchards Co., Spokane, Wash.

"Gentlemen:—

"As specified in supplemental contract for planting one hundred acres of my land by you, cover crop therefor is to be planted at time of tree planting, being this spring.

"Beg to state, it will be agreeable to me, provided you delay this planting of cover crop, getting same planted by September 1st, 1912, at which time it is desired a planting of vetch and rye, mixed, be used. Such being recommended by your horticulturist, Mr. A. G. Craig, as of most advan-

tage to the soil and which is in accordance with mentioned contract.

"Yours truly,

J. B. Sledge."

No offer was made to prove any actual pecuniary damage by reason of the delay in planting the apple trees, nor was any offer made to show that the trees, when planted, were not properly cared for, or that any of the trees on the whole 100 acres failed to grow. At the close of the plaintiff's evidence, the court, on defendant's motion, granted a nonsuit, holding that the provision in the contract for payment of \$60 an acre was not a legal provision for liquidated damages, but a penalty, first, because the same sum was to be paid on default in any one or all of three things undertaken by the defendant, namely, the planting of the trees, the caring for the trees, and the planting of the cover crop; second, because the time for the final performance of the contract was uncertain and that, had the parties intended the payment stipulated as liquidated damages, they would have fixed a definite time beyond which the planting could not be delayed; and third, because there was a substantial compliance with the contract in that all of the land was planted to trees, as shown by the evidence, by June 8, 1912. The plaintiffs appeal.

Three questions are presented for our determination: (1) Should the contract be construed as providing for liquidated damages or for a penalty? (2) Did the appellants, by the letter of May 20, waive default and accept what had already been done as part performance? (3) Did the court err in refusing to permit such proof of damages as was offered?

I. It will be noted that, by the contract, the respondent undertook to do three principal things: first, to plant the entire 100 acres to apple trees "as early as the weather will permit in the spring of 1912"; second, to plant the land to such cover crop between the rows as shall be, in the judgment of the respondent's horticulturist, to the best advan-

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tage to the land; third, to properly care for the trees when planted. By a literal construction of the contract, the \$60 an acre was to be paid by respondent upon failure to perform any one, any two, or all of these things. It is manifest that these things were, in their very nature, different in degree of importance. The total failure to plant the trees would be of much greater damage to the appellants than the failure to plant the cover crop or the failure to properly care for the trees when planted, and the latter would doubtless be a greater damage than the failure to plant the cover crop. Yet, if the contract be construed literally, as one for liquidated damages, the respondent would be liable for payment in the same amount on its default in the least important of these undertakings as for a default in the most important. While it may be reasonably argued that each of these things, by reason of the difficulty in estimating the damages likely to result from a default in either of them, would be a proper subject for liquidated damages, it is still evident that they are not, from their very nature, the proper subject for stipulated damages in the same amount. Though stipulated damages are allowable whenever actual damages are incapable of accurate measurement and proof, the damages stipulated cannot be sustained when, on the face of the contract, they have no reasonable relation to the gravity of the default for which they are intended to compensate. Reasonable compensation is of the very essence of the distinction between stipulated damages and a penalty. It is self-evident that, if \$60 an acre would be reasonable compensation for the failure to plant the trees—that is, a total failure to perform the contract—it would be an unreasonable amount as compensation for a failure in either of the other two things undertaken, or for a mere partial failure to perform the contract. It is equally clear that, if the \$60 an acre would be only a reasonable compensation for a failure to properly care for the trees, or to plant the cover crop, then it would be unreasonably small and inadequate as a com-

pensation for a total failure to plant the trees, that is, a total breach of the contract. If the parties had actually intended to fix stipulated damages to be paid for default, it is obvious that they would have stipulated different sums for default in these different undertakings. To permit a recovery of the same sums for a minor as well as a major default, or for a partial as well as for a total failure to perform the contract, would be unconscionable. The very fact that the parties fixed the same sum without regard to the gravity of the default, and whether the default might be partial or go to the whole contract, made the provision for payment a penalty and not an enforceable stipulation for liquidated damages.

"Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or of all such provisions, and the sum will be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages." 1 Pomeroy, Equity Jurisprudence (3d ed.), § 443.

"Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages." 1 Pomeroy, Equity Jurisprudence (3d ed.), § 444.

"Contracts often contain a variety of stipulations of unequal importance and therefore, admitting of many breaches for which the damages would be different in amount. In such a case a total breach would involve an injury greater than that which would result from the infraction of a particular stipulation. Hence it is self-evident that a sum stipulated to be paid, either for breach of one of the minor provisions or of the whole contract, could not be a liquidation of damages on the principle of compensation for actual in-

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jury. The sum would either be too great for a partial breach or wholly inadequate to one which involved the loss of the whole contract." 1 Sutherland, Damages (3d ed.), § 294.

See, also, *Krutz v. Robbins*, 12 Wash. 7, 40 Pac. 415, 50 Am. St. 871, 28 L. R. A. 676; *East Moline Co. v. Weir Plow Co.*, 95 Fed. 250, 255; *Monmouth Park Ass'n v. Warren*, 55 N. J. Law 598, 27 Atl. 932; *Nash v. Hermosilla*, 9 Cal. 584, 70 Am. Dec. 676; *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394; *City of Madison v. American Sanitary Eng. Co.*, 118 Wis. 480, 95 N. W. 1097; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987. In *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023, we distinctly recognize these principles, though finding that they were not applicable to the facts there presented.

II. But, even assuming that, notwithstanding the provision for payment in the same amount for any default, regardless of its gravity, the contract might be construed as one for liquidated damages because the uncertainty of the amount of damages in case of either default, still, the appellant's letter of May 20, 1912, presents, in our opinion, an insuperable obstacle to the recovery of the sum in question as liquidated damages. It is clear from the evidence that, at the time this letter was written, the appellants knew that the respondent had cleared the land, and was proceeding with the planting of the trees. The letter which we have set out in our statement of the facts is a clear recognition of this fact, and carries a conclusive inference that, if the work were even then prosecuted to completion, it would be accepted as a part performance, and the remaining undertaking to plant the cover crop might be delayed until September 1, and would then be accepted as a final performance. Clearly, the respondent was justified, notwithstanding the fact that suit had already been commenced, in assuming that the default therein claimed would be waived and that if it then proceeded with the planting of the trees, such ac-

tion would be accepted as a performance *pro tanto* of the contract. To now permit the appellants to say that they meant nothing by this letter, and that the respondent was not justified in proceeding with the performance of the contract on the faith of that letter, would be most inequitable. Mr. Sutherland, after discussing the rule that the same sum cannot be fixed as liquidated damages for different breaches of a contract of different degrees of importance, says:

"For the same reason that one sum cannot consistently be compensation alike for a total and partial breach, a stated sum made payable for the former cannot by construction be applied to any infraction after acceptance of part performance. In case of such a stipulation the stated sum is only recoverable upon the happening of the very event mentioned in the contract. If a partial breach occurs it has sometimes been said the stated sum is as to that breach only penalty, and damages are given on proof, without regard to it." 1 Sutherland, Damages (3d ed.), § 296.

The principle here applied has been admirably stated by the supreme judicial court of Massachusetts as follows:

"The question, what is liquidated damages, and what is a penalty, is often a difficult one. It is not always the calling of a sum, to be paid for breach of contract, liquidated damages, which makes it so. In general, it is the tendency and preference of the law, to regard a sum, stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages; because then it may be apportioned to the loss actually sustained. But, without going at large into the subject, one consideration, we think, is decisive, against recovering the sum in question as liquidated damages, namely, that here there has been a part performance, and an acceptance of such part performance. If the parties intended the sum named to be liquidated damages for the breach of the contract therein expressed, it was for an entire breach. Whether divisible in its nature or not, it was in fact divided by an offer and acceptance of part performance. It is like the case of an obligation to perform two or more independent acts, with a provision for single liquidated damages for non-performance; if one is performed, and not

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the other, it is not a case for the recovery of the liquidated damages." *Shute v. Taylor*, 5 Met. (Mass.) 61, 67.

This rule was recognized and applied, and the above language quoted by this court in *Myers v. Ralston*, 57 Wash. 47, 106 Pac. 474.

III. Since the appellants cannot recover the sum claimed as liquidated damages, it remains only to inquire whether there was any such proof, or offer of proof, of actual damage as to put the respondent to its defense. The only offer of evidence on the appellants' part was an offer to prove by an expert horticulturist that the open season for planting trees in the vicinity of appellants' land begins from the first to the tenth of April and ends about the middle or the last of May, and that trees planted later than that would probably be delayed in producing to the extent of one year. The appellant contends that the refusal to admit this evidence constitutes reversible error. It seems to us, however, that this evidence was properly refused, for two reasons. In the first place, the contract fixed no definite time within which the trees should be planted. The parties to the contract knew that the land had to be cleared, the stumps blown out, the brush and stumps burned, the land plowed and fully prepared before any trees could be planted. In the very nature of the case, little, if any, of this work could be performed in the winter time, and there is nothing arising to the dignity of evidence to indicate that weather conditions at any time after the making of the contract, November 1, 1911, until the opening of the spring of 1912, were such that the land could have been cleared, much less plowed, earlier than it was. Construing the contract, therefore, in reference to the known condition of the subject-matter, and remembering that no definite time was fixed in the contract when the planting of the trees should be completed, it seems to us that evidence as to the most advantageous time for planting was immaterial. The respondent had merely undertaken to plant the trees as early as the weather would per-

mit in the spring of 1912. The evidence falls far short of showing that this undertaking was not substantially performed. In the second place, there was no offer to follow the offer made with proof of the actual pecuniary damage which would result from the supposed delay in production to the extent of one year.

We are constrained to hold that the provision for the payment of \$60 an acre as provided in the contract must be construed as a penalty, rather than as liquidated damages; that the appellants, having accepted partial performance of the contract with full knowledge of the conditions, cannot be heard to say that there was a total failure of performance; and that, having failed to prove, or offer to prove, pecuniary damages in any definite amount, they have failed in their proof.

The judgment is affirmed.

Crow, C. J., CHADWICK, MAIN, and GOSE, JJ., concur.

[No. 11257. Department One. January 23, 1914.]

J. W. RIDER, *Appellant*, v. JOHN LaCLAIR, *Respondent*.¹

INDIANS—CONTRACTS—"SALES" OF CATTLE—CHATTEL MORTGAGES—VALIDITY. 3 Fed. Stat. Ann. § 2127, providing that all sales of cattle by an Indian in the Indian country to others than members of his tribe are void, except with the written consent of the agent of the tribe, liberally construed in favor of the Indian, covers chattel mortgages.

CONGRESS—"GENERAL" ACTS—APPROPRIATION BILLS. An act of Congress cannot be said to be not general and limited in its application to the time of its passage, because it was part of a bill appropriating money for a specified year; since general acts of Congress may be tacked onto appropriation bills.

INDIANS—ALLOTMENT—PERSONAL PROPERTY—ALIENATION. An Indian in the Indian country cannot alienate personal property purchased by the United States for the Indian with proceeds of the sale of an allotment which was not subject to alienation, the United

¹Reported in 138 Pac. 3.

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States having received the purchase price and retained title as trustee, thereby manifesting an intent that the proceeds of the allotment shall have the same legal status as the allotment itself; it resting with the United States to say when the trust shall be relinquished.

INDIANS—ALLOTTED LAND—CONTRACTS—MORTGAGE OR SALE OF CROPS—VALIDITY. Since the acts of Congress declaring contracts relative to, or claims growing out of, an Indian's land void unless approved by the Indian agent, do not apply to crop mortgages, under Rem. & Bal. Code, § 3659, making a crop mortgage a chattel, an Indian may mortgage a growing crop on his allotment or sell a crop of hay stacked thereon, in view of the absence of any express statutory prohibition and the present policy of the government to encourage agriculture and business pursuits; but whether the mortgagee may enter before severance, or to foreclose, in the absence of departmental order, is not decided.

INDIANS—INDIAN COUNTRY—"TRADERS"—LICENSES. A person engaged in the business of merchandising in a town outside of an Indian reservation, the Indian title to which has been extinguished, is not a "trader" in the Indian country, requiring a license under 3 Fed. St. Ann. § 2127.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 30, 1913, in favor of the defendant, after a hearing before the court upon an agreed statement of facts, in an action on contracts. Modified.

Holden & Shumate, for appellant.

H. A. LaBerge, for respondent.

CHADWICK, J.—Plaintiff sets up six separate causes of action, all of which involve the validity of contracts made by a Yakima Indian who lives in the Yakima Indian Reservation on patented allotted land. The land is patented under certain restrictions, and is held in trust by the government. The Indian defendant has not severed his tribal relations.

In the first cause of action, plaintiff seeks to foreclose a chattel mortgage on certain cattle which were given to defendant for his use and subsistence by the United States government, between one and two years prior to the execu-

tion of the mortgage, during all of which time the cattle were in possession of defendant on his allotment. The manner in which he had acquired the cattle was unknown to plaintiff. The United States did not consent to the mortgage. The court held that the United States was a necessary party to the contract; that the mortgage was void, and a foreclosure was denied. The ruling of the court is based upon the following statute:

"The agent of each tribe of Indians, lawfully residing in the Indian country, is authorized to sell for the benefit of such Indians any cattle, horses, or other live stock belonging to the Indians, and not required for their use and subsistence, under such regulations as shall be established by the Secretary of the Interior. . . . That where Indians are in possession or control of cattle or their increase which have been purchased by the Government such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong or to any citizen of the United States whether intermarried with the Indians or not except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void and the offending purchaser on conviction thereof shall be fined not less than five hundred dollars and imprisoned not less than six months." 3 Fed. Stat. Ann. § 2127.

Appellant contends that this statute prohibits sales, but not mortgages or other pledges. That a mortgage is not a sale but only a lien, has been declared by many, if not a majority, of all the courts, but it seems to us that it can make no difference whether it is a sale or a lien within the statute. It has been so often declared by statute, as well as by judicial decisions, that an Indian is not *sui juris*, that because of his inaptitude and congenital lack of an understanding of values, he should, so long as he maintains his tribal relations, be considered a ward of the government, that we find ready application of one of the first principles of statutory construction, that is, a consideration of the old law, the mischief, and the remedy. From the time of *Worcester v.*

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Georgia, 6 Pet. 515, 582, down to *United States v. Celestine*, 215 U. S. 278, it has been the rule of all courts to construe doubtful legislation in favor of the Indian. When so considered, we have no hesitation in holding that a mortgage made by an Indian of cattle held in virtue of the statute, is void when made without the sanction of the agent having supervision of the affairs of his tribe. The point is made that the statute is limited in its application to cattle in the possession of the Indian at the time of the passage of the act, because the act is not general but was included in a bill appropriating money for the Indian department for the fiscal year 1884. Were this a state statute, there might be some merit in this contention, but it is well known that many of the general laws passed by Congress are tacked onto appropriation bills and to the sundry civil bill, there being no constitutional limitation to hamper Congress in this respect. We think, too, that the act is broad enough to cover the increase of such cattle as the government may furnish.

The fourth cause of action raises the question whether an Indian can mortgage personal property purchased with the proceeds of the sale of the allotment of an incompetent Indian. We adopt the words of the trial judge:

"I think that upon the sale of an allotment of an incompetent Indian, in pursuance of section 1, Act of Congress of June 30th, 1910, Id. Fed. Stat. Annotated, Supplement 1911, page 96, or the Act 34 Stat. L. 1018, Id. Fed. Stat. Supplement 1909, page 228, the purchase price received by the United States has the same legal status as the allotment itself had and therefore is not subject to alienation by the Indian, and that property purchased (like that in question) by the United States for the Indian with said purchase price, the title being taken in the United States, also has the legal status of the allotment and is not subject to alienation. In other words, the purchase price of such an allotment when sold by the United States, or its proceeds when the United States uses such purchase price to purchase other property for the Indian, taking title in the name of the United States, does not become subject to alienation by the

Indian. The United States taking the title in its own name in trust for the Indian is as an express and unequivocal manifestation of its intention not to relinquish the trust—not turn the property over to the Indian to do with as he may please, and it seems to me that it rests exclusively with the United States as trustee and as guardian of the Indian to determine when, if at all, it will relinquish the trust and turn over the property to the Indian to do therewith as he may choose.”

The second and third causes of action raise the question whether an Indian can mortgage crops growing on his allotment, (a) when the mortgage does not provide for entry upon the allotment, and (b), when the only license to enter is that contained in the mortgage. By several statutes, all contracts made by an Indian to whom an allotment has been made “relative to the Indian’s land,” or “touching the land,” or to any “claims growing out of or in reference to annuities” etc., are made void unless approved by the government acting through its proper agency. It is contended that a mortgage of growing crops falls within the prohibition of these statutes. No cases are cited where a crop mortgage given by an Indian has been passed on by the courts. Counsel for appellant say there are none. The writer has been unable to find any. It has been uniformly held that leases and other contracts going to the possession of the Indian’s land are proscribed unless approved. *Coey v. Low*, 36 Wash. 10, 77 Pac. 1077; *Smith & Steele v. Martin*, 28 Okl. 836, 115 Pac. 866; *Williams v. Steinmetz*, 16 Okl. 104, 82 Pac. 986.

In this state, our statute, Rem. & Bal. Code, § 3659 (P. C. 349 §§ 1-39), makes a crop mortgage a lien upon a chattel. It passes no interest in the land. The cases cited do not apply. As at present informed, we are disposed to hold, in the absence of a prohibition, that an Indian has power to sell and may give a mortgage upon a crop growing on his allotment. The policy of the government with reference to its Indian wards is not always certain. It seeks to

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promote a spirit of independence and an interest in agriculture and business pursuits. It has made the Indian a citizen subject to the general laws of the state. On the other hand, it has limited his rights and privileges both by statute and regulation. The fact that it has more often said what he may not do than what he may do, that is, saying that certain contracts shall be void rather than *all* contracts shall be subject to the approval of the Indian agent, would indicate a purpose to allow him to contract without restraint unless expressly prohibited by a statute or regulation so to do. *Gho v. Jules*, 1 Wash. Ter. 325; *United States v. Paine Lum. Co.*, 206 U. S. 467; *Ke-tuc-e-mum-guah v. McClure*, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782.

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end." *Matter of Heff*, 197 U. S. 488, 499.

We have no hesitation in holding that the affirmative acts of Congress with reference to certain kinds of personal property, coupled with the later policy of the government to encourage agricultural pursuits among the Indians and to encourage independence rather than dependence, are sufficient to clearly manifest the purpose of Congress to grant

to the Indians a limited power to contract unless restrained by some departmental regulation. This being so, we hold the crop mortgages to be valid liens. Whether the mortgagees can enter before severance or enter to foreclose, is a question we cannot answer upon the record before us. It may be that the government, in aid of its avowed policy to protect the Indian from the "greed and avarice" of the white man, could prevent an entry by departmental order. The question is hardly before us, and we prefer to reserve it.

The court held, and properly so, that one engaged in the business of merchandising at the town of Wapato, and who bought and sold therein, was not a trader requiring a license to trade in the Indian country. Wapato is located within the boundaries of the Yakima Indian reservation, upon land to which the Indian title has been extinguished. The extinction of the Indian title seems to be the test for determining the character of land, within or adjacent to an Indian reservation. *United States v. Celestine, supra*; *Ex parte Crow Dog*, 109 U. S. 556; *Bates v. Clark*, 95 U. S. 204.

A trader or seller of merchandise upon eliminated land is not a trader within the Indian country, requiring a license under § 2127 *et seq.* 3 Fed. St. Ann.

The next cause of action pertains to a bill of sale of hay stacked on an allotment. What we have said with reference to crop mortgages covers this cause of action.

The case will be remanded, with directions to enter a judgment consistent with this opinion. Neither party will recover costs in this court.

CROW, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

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Statement of Case.

[No. 11283. Department Two. January 23, 1914.]

M. A. LEONARDO, *Appellant*, v. A. L. BUNNELL *et al.*,
Respondents.¹

SUBMISSION OF CONTROVERSY—AGREED CASE—EVIDENCE—ADMISSIBILITY. Upon the submission of an agreed case, under Rem. & Bal. Code, § 378, providing for submission of controversies without action by an agreed case containing the facts, it is error to receive evidence over the objection of the adverse party; since no facts can be considered save as agreed upon in the signed and verified submission.

ANIMALS—CONTRACTS—CONSTRUCTION—HERDING SHEEP—DIVISION OF PROFITS—COMPUTATION. Under a contract for the herding of sheep furnished by the first parties, who were to advance all money for labor, supplies, and expenses of running the sheep and also guarantee that one-half of the net profits should equal \$50 as wages to be paid the party of the second part, who was to perform all the labor, employ skilled herders and furnish the first parties with an itemized account of the expense of maintaining the sheep from month to month, a stipulation to the effect that, in consideration of the guarantee of \$50 a month as wages, if, after all the expenses of running the sheep are paid, one-half of the net profits exceeds the \$50 per month, the second party (the herder) will divide said excess equally with the parties of the first part, requires that the herder's expenses in running the sheep, as well as expenses paid by the first parties, be charged against the gross receipts, as though it were a partnership contract; and after first paying the wages of \$50 per month from one-half the net profits, the balance of such half was to be divided equally.

SUBMISSION OF CONTROVERSY—HEARING—JUDGMENT—VACATION. It is not error to set aside a judgment on an agreed case, where it had been entered without any hearing.

Appeal from a judgment of the superior court for Klickitat county, McKenney, J., entered December 30, 1912, upon findings in favor of the defendants, upon an agreed case relating to a contract. Reversed.

W. B. Presby, for appellant.

N. B. Brooks and Miller, Crass & Wilkinson, for respondents.

¹Reported in 137 Pac. 1033.

PARKER, J.—These parties submitted to the superior court for Klickitat county an agreed case, under Rem. & Bal. Code, § 378 (P. C. 81 § 773), with a view to having certain differences between them settled by the judgment of that court. Their agreed statement of facts, which they submitted as a basis of the court's judgment, reads as follows:

"The parties hereto have a question in difference which might be subject to a civil action and agree upon and submit to the court a case, and stipulate and agree that the following are the facts upon which the controversy depends.

"(1) A. L. Bunnell and G. L. Bunnell on the one part and M. A. Leonardo on the other entered into a contract which is herewith submitted to the consideration of the court.

"(2) Since the execution of said contract the said G. L. Bunnell has died, leaving a widow, and A. L. Bunnell is the agent of said widow and has authority to sign this agreement in her behalf.

"(3) That under the terms of said agreement M. A. Leonardo has run the sheep mentioned in the lease for the term of one year, has returned them to the said A. L. Bunnell and the widow of said G. L. Bunnell, deceased, and has performed all of the conditions of the contract.

"(4) That the only controversy between the parties is how much, if anything, Leonardo is entitled to under the terms of said contract.

"(5) That the entire gross proceeds from the sale of wool and increase amounted to \$10,750.82, which was received by the said A. L. Bunnell.

"(6) That M. A. Leonardo has received from said gross proceeds \$4,966.75.

"(7) That the entire expenses paid by Leonardo in running said sheep, including his wages, are \$4,876.55. His wages amounted to \$257.80.

"(8) That A. L. Bunnell has paid on the expenses and running said sheep \$375.

"The parties hereto submit as an agreed case to the court the question of how much under this statement and under the terms of said contract Leonardo is entitled to receive."

The portions of the contract which require notice here, submitted to the court as a part of the agreed case, read as follows:

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"This agreement, made in duplicate, between A. L. Bunnell and G. L. Bunnell (partners doing business under the name of A. L. Bunnell) of Klickitat county, state of Washington, parties of the first part, and M. A. Leonardo, of the same county and state, party of the second part witnesseth:

"That the said parties of the first part agree to furnish and place in charge of the party of the second part consisting of 2,317 head of ewe sheep for a period of one year beginning October 15th, 1910, and ending on October 15th, 1911, on the following terms and conditions: . . .

"Said parties of the first part are to furnish all necessary winter range in and about the home ranch near Centerville, in Klickitat county, Washington . . .

"Said parties of the first part are to furnish as a loan all necessary money for labor, supplies and expenses for running said sheep during the existence of this agreement, said party of the second part agreeing to repay the principal of such advancements with interest from the date they are made until repayment, at ten per cent per annum.

"The party of the second part is to perform all necessary work and take care of said sheep in a careful manner usual among persons experienced and skilled in sheep raising and in his employing laborers he is so far as it is possible for him to do employ those experienced and skilled in the handling of sheep, and at the termination of this lease, is to return said sheep at Glenwood, Wash.

"It is expressly agreed and understood by the parties hereto that the ownership of all the increase and wool from said sheep shall vest and remain in the said parties of the first part as security for advancements herein provided for and made to the party of the second part until said advancements are fully paid.

"If after all the expenses of running said sheep required by the parties hereto are paid, if one-half of all the net proceeds of the increase of said sheep and one-half of all the net proceeds of wool grown on said sheep and of their increase and also one-half of the net proceeds of the wool grown on the bucks used for breeding purposes, added together does not equal the sum of fifty dollars per month during the time the party of the second part works with, and cares for said sheep, then the parties of the first part agree to add and pay a sufficient sum to make the party of

the second part fifty dollars per month while he works with and cares for said sheep, and in consideration of the parties of the first part warranting the party of the second part the sum of fifty dollars per month while he works and cares for said sheep the party of the second part agrees in the event that one-half of the net proceeds of the increase and wool from said sheep as hereinbefore mentioned exceeds the sum of fifty dollars per month while he works with and cares for said sheep to divide said excess equally with the parties of the first part.

"It is understood and agreed that the parties to this agreement are to divide equally the expenses of summer range, in the Columbia forest reserve in the vicinity of Mt. Adams, and are to pay equally for expenses of shearing and hauling wool to market.

"One-half the losses of the original sheep during the year are to first be made good from the increase with good mutation lambs and the remainder of said lambs are to be considered net increase for equal division.

"The parties hereto are to sell the wool and net increase of lambs at such time and price as to them seems most advantageous and as may be jointly agreed upon.

"The party of the second part is to furnish the parties of the first part with an itemized account of the expenses of caring for and maintaining said sheep each month during the term of this lease."

On November 1, 1911, there was prepared and signed by the court a judgment in favor of Leonardo, awarding him \$1,220.17. This judgment it was claimed, and we will now assume, was prematurely rendered before the parties were given a hearing upon their agreed case. Thereafter the Bunnells applied to the court to have the judgment set aside and a hearing granted upon the merits, which was, by the court, ordered over the objection of counsel for Leonardo. Upon the hearing thus granted, counsel for the Bunnells contended that the contract for the care of the sheep was so uncertain and ambiguous in its terms touching the division of the proceeds, as to call for oral explanatory evidence relative thereto. They offered evidence along this line, all of which

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was, by the court, received over the objection of counsel for Leonardo. At the conclusion of the hearing, the court rendered judgment in favor of Leonardo for the sum of \$289.53 only. This judgment was the result of the court's conclusion, drawn from the agreed case and the oral evidence received. From this disposition of the cause, Leonardo has appealed.

It is contended by counsel for appellant that the superior court erred in receiving evidence outside of the statement of the agreed case submitted by the parties to the court in their signed and verified statement. This contention must be upheld. A proceeding of this nature comes into court by the free and voluntary act of all of the parties concerned, and not otherwise. No fact or question can be the subject of the court's inquiry in such a proceeding save as agreed upon and submitted in the signed and verified statement constituting the agreed case. The agreed case here presented goes no farther than this. It submits nothing but certain agreed facts and certain questions. It contains no agreement for the court receiving other evidence touching the facts or questions involved. Rem. & Bal. Code, § 378 (P. C. 81 § 773), by authority of which this proceeding was instituted, reads:

"Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon as if an action were pending."

The court of appeals of Missouri, dealing with a similar question under a statute which reads exactly like ours (Missouri Annotated Statutes, 1906, vol. 1, § 793), in the case of *State ex rel. Webb v. McCune*, 129 Mo. App. 511, 107 S. W. 1080, observes:

"Where the controversy is submitted by agreement without action, i. e. without filing suit, having summons issued and the defendant brought into court against his will and without formal pleadings, etc., the jurisdiction of the court over parties and subject-matter attaches only to the precise state of facts contained in the stipulation and in such proceedings, the court has no authority to permit either party against the objection of the other to adduce other facts or to introduce evidence of any character. As we have intimated, the jurisdiction to entertain the cause is founded on the contract of submission—the agreement of the parties—and should the court permit either party to inject new matter into the case, obviously the submission would not consist of the state of facts voluntarily brought to the court by the parties but of an entirely different case and one not approved by mutual consent."

This view finds support in the following authorities: *Crandall v. Amador County*, 20 Cal. 72; *Frailley v. American Legion of Honor*, 132 Pa. St. 578, 20 Atl. 684; *Andrus v. Shippen Township*, 36 Pa. Sup'r Ct. 22; *Missouri, K. & T. R. Co. v. Union Trust Co.*, 156 N. Y. 592, 51 N. E. 309; 37 Cyc. 353. We think it clear that the judgment to be rendered in a proceeding of this nature must be rested entirely upon the facts appearing in the agreed case. If such facts should appear insufficient upon which to base a judgment, it would seem to follow that the cause would have to be dismissed, rather than go outside and bring into the case facts beyond the agreement of the parties.

The question then is: What is the proper judgment to render upon the facts here submitted by the agreed statement of the parties? We think the court's basis for the computation of the amount due appellant must be found in the correct answer to the question, Is the sum of the amounts of the entire expense stated in the agreed case chargeable against the gross receipts from the wool and increase of the sheep as though it were an ordinary partnership affair? We are of the opinion that a reading of the entire contract renders it reasonably certain that this question must be an-

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swered in the affirmative, though it must be conceded that there are certain portions of the contract, standing alone, which furnish some ground for argument to the contrary. We are also of the opinion that the contract, when read as a whole, shows an intent that Leonardo's wages of \$50 per month should be first paid from one-half of the net proceeds of the wool and the increase, and the balance of that one-half divided equally between Leonardo and the Bunnells. Computation upon this basis will readily arrive at the result reached by the superior court in its first judgment, to wit: \$1,220.17. Indeed, there does not seem to be any serious controversy that this would not be the correct result when computed upon the basis we have adopted as the proper construction of the contract.

Some contention is made that the court was in error in setting aside the first judgment and granting the hearing upon which the judgment here sought to be reversed was rendered. This, however, we think of but little consequence now, though it would affect the question of interest upon the proper judgment. We think, however, in view of the facts shown touching the premature rendering of the first judgment without a hearing, that its setting aside was not erroneous. We therefore conclude that, instead of reinstating that judgment, the judgment finally rendered should be reversed and a new judgment rendered in favor of Leonardo for the sum of \$1,220.17.

It is so ordered.

CROW, C. J., FULLERTON, MOUNT, and MORRIS, JJ., concur.

[No. 11325. Department Two. January 23, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Henry Sieler,*
Appellant, v. WILLIAM H. VIRNIG, et al., County
*Commissioners, etc., Respondents.*¹

ANIMALS—RUNNING AT LARGE—COUNTY COMMISSIONERS—HEARINGS—RECONSIDERATION—PROCEEDINGS—FINALITY. Under 3 Rem. & Bal. Code, § 3172-1 *et seq.*, providing that the board of county commissioners may, after a hearing, designate, by an order made and published or posted for four consecutive weeks, the boundaries of a district in which it shall be unlawful to permit live stock to run at large, and making it a misdemeanor to violate the order after it has been published or posted, as required in Id., § 3172-3, the commissioners' power is not fully exercised by the granting of an application upon a hearing and the record entry of such action on the minutes; hence, until the order is entered and published, the matter was in a determinative stage, and the commissioners had power to give notice of a reconsideration of the application.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered May 16, 1913, denying a writ of prohibition to prevent reconsideration of an order of the board of county commissioners. Affirmed.

William M. Clapp and *Herbert H. Sieler*, for appellant.
C. G. Jeffers, for respondents.

MORRIS, J.—This action was brought under Laws 1911, p. 93, ch. 25 (3 Rem. & Bal. Code, § 3172-1 *et seq.*), authorizing boards of county commissioners to create districts in which livestock shall not run at large. The case was submitted to the court below and here upon an agreed statement of facts, from which it appears that the relator and others seeking to take advantage of the act filed a petition with the board of county commissioners of Grant county, seeking to have certain territory described in the petition set aside as a district. Due notice of the filing of this petition and of the time fixed for hearing was

¹Reported in 137 Pac. 1039.

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given, and on December 2, 1912, the matter came on to be heard. At this meeting of the board, two members only were present. Rem. & Bal. Code, § 3867 (P. C. 115 § 177), however, provides that two shall constitute a quorum for the transaction of business. The statement recites:

“And the said board, after hearing the said petition on the merits and fully considering the same and there being no opposition to the said petition or any part thereof; granted the petition as prayed for and ordered that livestock of all kinds be prohibited from running at large within the territory named in said petition, and notice given accordingly as required by law, and the said order was entered in accordance with the practice of the said board.”

On December 3, the third member of the board appeared, and presented a remonstrance against granting the petition, and the board, after considering the remonstrance, made an order to the effect that the board would reconsider its action on the petition, and fixed January 7, 1913, as the time for a rehearing. Notice of this rehearing was given relator in the form of a letter from the county auditor. The statement then recites that no other notice of the hearing was contemplated, and that, at the hearing on January 7, the board intended to proceed “with the reconsideration of the said petition and to refuse to grant the petition.” Relator then sued out this writ, in which he sought a decree holding the action of December 3 to be illegal, prohibiting the board from any reconsideration of its action of December 2, and requiring publication of an order prohibiting livestock from running at large within the territory described in the petition and order of December 2. This writ was denied, and he appeals.

The appeal presents this question: Did the board of county commissioners have the power to reconsider their action of December 2? The act of 1911, in so far as here applicable, provides:

“Section 1. That the board of county commissioners of any county of this state shall have the power to designate

by an order made and published, as provided in section three of this act, certain territory within such county in which it shall be unlawful to permit livestock of any kind to run at large. . . ."

"Sec. 3. If the board of county commissioners shall determine to prohibit the running at large of livestock within the territory described in such petition or in any portion thereof, it shall make an order defining the boundaries of such territory, which shall be entered upon the records and published in a newspaper having general circulation in such territory for four successive weeks, or by posting in three public places in such territory for four weeks."

"Sec. 4. Any person, or any agent, employee or representative of a corporation, violating any of the provisions of such order after the same shall have been published or posted as provided in section three of this act, shall be guilty of a misdemeanor,"

It is, we think, clear from the reading of these sections that the power vested in the commissioners was not wholly exercised until the publication provided for in § 3. The granting of the petition and the record entry of such action did not establish the contemplated district. That could only be designated, in the language of § 1, "by an order made and published, as provided in section three." And § 3 provided that the order should not only be entered of record, but published and posted for four weeks. While § 4, confirming the contention that the order did not become effectual until after the publication, provided there could be no violation of it until after its publication or posting. When, therefore, the board, on December 3, determined to reconsider its action of December 2, the order was yet in the making. It had not passed beyond the determinative stage, and was not a final or completed action under which rights, either property or personal, could have vested. It does not seem to us that the requirement for the publication of the order of segregation was of a nature like to those statutes requiring the publication of the proceedings of boards of this character, which have sometimes been

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held to be directory only and hence the failure to publish in no wise affected the proceedings. Under this law, a special power was conferred upon county commissioners, and the manner of its exercise specifically pointed out. It cannot be doubted that the power so conferred could be exercised only in the prescribed manner, and that the prescribed manner includes not only the making of an order but its publication or posting. Hence, we say that, on December 8, the matter was still within the discretionary power of the board, and it had the power to reconsider its action of the previous day.

In *People v. Bailhache*, 52 Cal. 310, in construing a statute empowering boards of supervisors to unite and consolidate county offices by "adopting, recording and publishing," an ordinance to that effect three months prior to an election, it was held that the adoption and recording were of no effect without the publication, and that under the statute the publication was as essential as the adoption or recording. This case seems to us to be directly in point. It was followed and a like rule announced in *People ex rel. Stoddard v. Williams*, 64 Cal. 87, 27 Pac. 939.

We do not think this appeal calls for a decision of the question submitted by the briefs as to the general power or right of county commissioners to reconsider their action. That question might have been presented had the commissioners made and published the order of segregation. We therefore do not discuss that question, except in so far as it may be embraced in what we have said.

The judgment is affirmed.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 11327. Department One. January 23, 1914.]

MARY BRITZ *et al.*, Respondents, v. A. N. HOULEHAN,
*Appellant.*¹

EXPLOSIVES—INJURIES TO THIRD PERSONS—NEGLIGENCE—COMPLAINT—SUFFICIENCY. A complaint alleging the setting off of a blast, without notice, near plaintiff's residence in a populous city, causing a terrific explosion throwing dust into plaintiff's eyes, states a cause of action for negligence, although the acts are not characterized as negligent.

PLEADING—ISSUES AND PROOF—VARIANCE. In an action for negligently setting off a blast in a brick yard and throwing brick dust into plaintiff's eyes, it is not a fatal variance that it was some other foreign substance, thrown by the blast, that injured plaintiff's eyes.

APPEAL—REVIEW—VERDICT. Where the evidence is conflicting and sustains the verdict, and the trial court refused to set it aside, it cannot be disturbed on appeal.

DAMAGES—PERSONAL INJURIES—DEFENSES—AGGRAVATION OF DISEASED CONDITION—INSTRUCTIONS. In an action for personal injuries, in which there was an affirmative defense to the effect that plaintiff's present condition was due to a previous diseased condition, it is not error to instruct to the effect that a previous diseased condition would only go to the amount of the recovery and that defendant would be liable only for aggravation thereof, if any, and if the jury find for the plaintiff, the defense pleaded would not be a separate affirmative defense but could only be considered in determining the amount of the recovery.

EXPLOSIVES—BLASTING—INJURIES TO THIRD PERSONS—NEGLIGENCE—EVIDENCE—PRIMA FACIE CASE. In an action for setting off a blast in a populous city, near plaintiff's residence, evidence that the blast was set off without notice and injured the plaintiff establishes a *prima facie* case, casting upon the defendant the burden of showing the exercise of due care.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 8, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a blast. Affirmed.

¹Reported in 137 Pac. 1035.

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Opinion Per ELLIS, J.

John P. Hartman and Arthur E. Nafe, for appellant.

Willett & Oleson, for respondents.

ELLIS, J.—This is an action for damages for personal injuries, claimed to have been sustained by the plaintiff wife by the setting off of a blast by the defendant. The complaint, in substance, alleged that the defendant owns and operates a brick yard, in the city of Seattle, directly across the street from the home of the plaintiffs; that, about March 1, 1910, while the plaintiff wife was in the back yard of her home, the defendant, without warning, caused to be discharged an explosive in or near their brick yard; that the explosion was accompanied by a terrific concussion, and caused a large quantity of dirt, dust, and brick dust to be thrown in every direction; that the plaintiff wife was stunned and shocked by the explosion, and that a considerable quantity of dust and brick dust was thrown against her person and into her face and eyes; that her eyes thereby became sore and ulcerated, and she was rendered practically blind for some time, suffering great pain; that prior to that time, her eyes had been sound and in good condition; that she was forced to secure the services of a physician, and incurred expense to the extent of \$50; that she was rendered unable to perform her regular duties, and still has much trouble with her eyes because of the injury.

The answer denied the material allegations of the complaint, and, by way of affirmative defense, alleged that, prior to the time of the accident, the plaintiff wife was suffering from some disease of the eyes which caused their present condition, and that this condition was in no way caused by any act of the defendant. The affirmative matter in the answer was traversed by the reply. The jury returned a verdict for the plaintiffs in the sum of \$500. The defendant moved for judgment notwithstanding the verdict, and in the alternative, for a new trial. Both of these motions

were overruled, and judgment was entered upon the verdict. The defendant appeals.

The appellant advances three grounds as entitling her to a reversal: (1) that the complaint charged no negligence; (2) that the evidence was insufficient to sustain the verdict; (3) that the court erred in giving certain instructions.

I. Though the complaint does not characterize the acts of the appellant as negligence, it does set out facts which, if sustained, would constitute negligence. It alleges the setting off of the blast without notice or warning in the midst of a populous city, directly across the street from the respondents' residence, causing a terrific concussion and throwing dust or brick dust into the respondent's eyes, whereby they were injured. These things, if sustained by the proof, *prima facie* established negligence. They were sufficient to put the appellant to her defense of due care.

"We hold, therefore, that in this case, as the blasting is not claimed to have been unlawful, the liability of the appellants depended upon whether they were negligent or not, to prove which under the circumstances the fact of the injury was sufficient *prima facie* evidence; but that they should have been permitted to show due care on their part, and that the question of their negligence was for the jury." *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. 936.

See, also, *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 92 Am. St. 892, 61 L. R. A. 583; *Klein v. Phelps Lumber Co.*, 75 Wash. 500, 135 Pac. 226; *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 48 Am. St. 146, 29 L. R. A. 718; *Hay v. Cohoes Co.*, 2 N. Y. (2 Comst.) 159, 51 Am. Dec. 279; *Colton v. Onerdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; *Munro v. Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. 248. It was only necessary to plead such facts as it was necessary to prove, and which, if established, would make a *prima facie* case. Such facts were pleaded. The complaint was sufficient.

II. There was ample evidence to sustain the verdict. A review of it in detail would merely lengthen this opinion to no

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profit. The principal contention is that there was a variance between allegation and proof in that the evidence showed that the plaintiff's eyes were injured, if at all, by some other substance than brick dust. There was ample evidence to go to the jury tending to show that some foreign substance was, by the blast, thrown into the plaintiff's eyes. That it did not affirmatively appear that it was brick dust hardly arises to the dignity of a variance, much less a fatal variance between pleading and proof. We have carefully examined the voluminous record, consisting of nearly three hundred pages, and find a sharp conflict on nearly every question of fact. The trial court denied the motion for new trial. In such a case, it is elementary that the verdict of the jury will not be set aside on appeal for insufficiency of evidence.

III. In his charge to the jury, the trial court, after reciting the allegations of the affirmative defense contained in the answer, said: "This affirmative defense adds nothing to the pleadings in the case." The appellant contends that this language was calculated to lead the jury to believe that evidence tending to establish a prior diseased condition of the eyes should have no weight or consideration. If this were all of the instruction, there would be some merit in the claim. The court, however, almost immediately thereafter, and as a part of the same instruction, charged the jury as follows:

"Any soreness or trouble of Mrs. Britz's eyes prior to that time would not in itself be any defense. That would simply go to the amount of the recovery. Defendants would not have any right to injure or damage Mrs. Britz's eyes because of the fact that they were sore or diseased, if you find that they were sore and diseased. On the other hand, the defendants would not be responsible for such soreness or disease not caused by the acts of the defendants as set forth in the complaint. For any aggravation, however, of such trouble or any injury in addition to any prior trouble, if any, the defendants would be liable, if liable at all. You will, therefore not consider this affirmative defense pleaded in the answer as a separate affirmative defense, but could only take into consideration

the matters pleaded therein in determining the amount of your verdict if you should find in favor of the plaintiffs."

The instruction, taken as a whole, clearly stated the law as repeatedly declared by this court. *Frick v. Washington Water Power Co.*, 76 Wash. 12, 135 Pac. 470; *Zola-wenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090; *Jordan v. Seattle*, 80 Wash. 298, 70 Pac. 743.

The court further instructed the jury to the effect that proof that the explosion occurred without warning and was caused by the defendant to the plaintiff's injury, made a *prima facie* case against the defendant, casting upon her the burden of showing that she exercised due care. The appellant contends that this instruction was erroneous, in that it cast upon her the burden of showing that she used due care and gave warning. Under the circumstances of this case, we find no error in this instruction. What we have said in discussing the pleadings and authorities there cited make a further discussion of this question unnecessary. In *Munro v. Pacific Coast Dredging & Reclamation Co.*, *supra*, the supreme court of California, in passing upon an instruction couched in almost the same terms as that here under consideration, used the following language:

"We perceive no error in the above direction. The evidence shows clearly that this blast was exploded in a thickly settled portion of the city. We are of opinion that no degree of care will excuse a person, where death was caused by such explosion, from responsibility for it."

The record presents no error warranting a reversal. The judgment is affirmed.

CROW, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

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Opinion Per MOUNT, J.

[No. 11393. Department Two. January 23, 1914.]

W. H. LAMB, Respondent, v. LEWIS LEVY, Appellant.¹

FRAUD—MISREPRESENTATIONS—LOCATION OF PROPERTY—EVIDENCE—SUFFICIENCY. A verdict for damages for fraud is sustained where it appears that plaintiff and defendant were friends, and plaintiff was induced to trade store fixtures and goods worth \$300 for defendant's lot, on defendant's false representations that the lot was located close to the Tacoma tide flats, and worth \$300, when in fact it was two miles from that location and of no value and plaintiff was unable to make any investigation except to inquire the value of lots in the location described.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 27, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Chas. M. Fouts, for appellant.

Thomas J. Casey, for respondent.

MOUNT, J.—The plaintiff brought this action to recover damages on account of alleged false and fraudulent representations, made to him by the defendant, which representations were relied and acted upon.

The cause was tried to the court and a jury. A verdict was returned in favor of the plaintiff. A judgment was entered upon this verdict, and the defendant has appealed.

The argument in the brief of the appellant is based upon the ground that the court erred in refusing to take the case from the jury and direct a verdict in favor of the appellant. In view of the fact that the jury found in favor of the respondent, we must assume that the facts as testified to by him are correct.

It appears therefrom that, in April, 1911, the respondent was the owner of a small store and fixtures and stock of confectionery goods, in the city of Seattle. This store was worth

¹Reported in 137 Pac. 1024.

\$300, for which amount the respondent had offered to sell it. The appellant and the respondent had been personal friends for several years. At about the date above stated, the parties met, and the respondent told the appellant that he was endeavoring to sell his store for \$300. Whereupon the appellant said to the respondent, "Let me deal with you. I will give you a good deal; one that you can rely on. It is a lot close in to the tide flats in Tacoma." The respondent said, "What is your lot worth?" To which the appellant answered, "\$300, the same as your store . . . I will give you a good deal to a big lot. Furthermore I will give you writings to the effect that it is worth \$300." The respondent testified that, relying on these statements and believing the appellant to be an honest, upright man, he took the writing and said, "Well and good, the deal is made."

On the same day or the next, the respondent met a friend who was engaged in the real estate business, and told him of the trade he had made with the appellant, and asked him if he knew the value of the lot. This friend said to the respondent in substance, that if the lot was where it was represented to be, in the tide flats of Tacoma, it was worth from \$600 to \$1,000.

On the next day, the respondent received a deed from the appellant, and surrendered to him the writing, which had theretofore been given. The respondent afterwards learned that the lot was of no value, or practically of no value; that it was not located in or near the tide flats in Tacoma, but was located many miles from Tacoma and at least two miles from the tide flats; that it was rough, covered with brush, inaccessible by road or otherwise, and could not be located except with the assistance of a surveyor. When the respondent learned these facts, he tendered the deed back to the appellant, which he refused to accept. Thereupon this action was brought.

The substance of the appellant's argument is that, inasmuch as the only allegation of fraud was misrepresentation as

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to the value, and inasmuch as the respondent inquired of a friend as to the value, that therefore he did not rely upon the representation as to value, and for that reason the action should be dismissed. But as we have seen above, the appellant represented that the lot was worth \$300; that it was located close in to the tide flats in Tacoma. The location of the lot was the principal part of its value. The respondent testified that he had no means of investigating the location of the lot, and that he did not investigate its location, but relied wholly upon the statements of the appellant. The respondent simply stated to a friend where the location was, as represented by the appellant, and asked its value. The friend told the respondent, if it was in that locality, the lot was worth between \$600 and \$1,000. It was not in that locality, and it was not located where it could be of any substantial value. We think the case was clearly one for the jury. In *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447, this court said:

“Representations, as of his own knowledge, of material and inducing facts susceptible of knowledge, made by a vendor in ignorance of the facts, but with the knowledge that the vendee is relying upon the representations as true and under circumstances reasonably excusing the vendee from investigating for himself, are actionable on the part of a vendee so relying to his injury. In such a case, the fraud of the vendor consists in representing as true, with knowledge that it is being relied upon as true, that which he did not know to be true. This rule is supported by the trend of modern authority and has been consistently adhered to by this court.” [Citing a number of cases.]

Under this rule, we are satisfied that, if the evidence of the respondent was true, as the jury undoubtedly found, he was justified in relying upon the representations of his friend.

The judgment is therefore affirmed.

CROW, C. J., FULLERTON, MORRIS, and PARKER, JJ., concur.

[No. 11396. Department One. January 23, 1914.]

*In the Matter of the Estate of ANNA DESCHAMPS.*¹

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—ADVANCES BY HUSBAND—COMMUNITY PROPERTY. The status of the wife's separate real property is not affected by the fact that the husband put some of his money into it for repairs and upkeep, except as subject to a possible equity therefor, which should be disregarded when the amount was small, and was advanced without any understanding that it carried an interest in the property.

SAME—WIFE'S SEPARATE PROPERTY—TRADE—RIGHTS OF HUSBAND. The fact that the wife's separate real estate was traded for property and her husband named as a grantee in the deed, would not give him a community interest in the property, even if he furnished a small amount of property in the trade, where it was apparent that he did not regard the property as his own.

SAME—COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show that property, the deed to which was taken in the name of a husband and wife, was their community property, where it is undisputed that the greater part of the consideration was a trade for separate real estate belonging to the wife, the husband furnishing property of very little value, without any agreement for an interest, and there was nothing to show that the wife, in directing the deed to be made to herself and husband, intended to give up a half interest in the property or that the husband should assert a greater interest than that represented by his advances.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 23, 1913, upon excepting to the final account of an executor. Affirmed.

McCafferty, Robinson & Godfrey, for appellant.

Scott Calhoun, for respondent.

CHADWICK, J.—Mrs. Deschamps died on the 24th day of December, 1909, leaving a will, by the terms of which she devised and bequeathed to Mrs. Georgette McCabe, a daughter by a former husband, all of her estate, except certain real property situated in Pierce county, which she willed to her husband, Samuel Deschamps, upon condition that he relin-

¹Reported in 137 Pac. 1009.

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quish any claim which he might have in the estate devised to her daughter. The will was duly admitted to probate and pronounced valid. Deschamps was ordered to elect whether or not he would abide by the provisions of the will. In compliance with this order, Deschamps filed a notice in which he declined to accept under the will, and stated his intention of retaining his separate and community interest in the property so devised. He also filed objections and exceptions to the final account of the executor, which were overruled and denied. On April 23, 1913, the court entered a decree awarding the real property to the daughter Mrs. McCabe. From an order overruling objections and exceptions to the final account, this appeal is taken.

The only question for our determination is whether or not the real property in controversy is community property. Appellant bases his claim upon the facts that, in the deed of conveyance, he is named as joint grantee, that part of the consideration was his separate property, and that the property was acquired during the time he and the deceased were living together.

At the time of her marriage, Mrs. Deschamps was the owner of the Olympic Apartments, in Seattle, Washington. Appellant claims that they were in bad condition, and that he paid out some of his own money in repairs and up-keep. This would not give him a community interest. The status of the property was fixed at the time it was purchased. *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673. It was in Mrs. Deschamps, and unless divested by deed, by due process of law, or the working of an estoppel, must remain there, subject to a possible equity, under the case of *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937, as distinguished in *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088, and *United States Fid. & Guar. Co. v. Lee*, 58 Wash. 16, 107 Pac. 870, in which case the court said: "We do not desire to extend the rule in that case." The amount advanced, if any, was small, and entirely disproportionate to the value

of the property and it nowhere appearing that it was advanced with the understanding on the part of either husband or wife that it carried an interest in the property, it ought to be disregarded under the rule of *Worthington v. Crapser*, 63 Wash. 380, 115 Pac. 849.

Mrs. Deschamps traded a one-half interest in the apartments to one Grow for the property in controversy, consisting of two lots and a dwelling house, described as lots 31 and 32, block 174, Gillman's addition to Seattle. This property was mortgaged for \$2,286.70, which the grantees assumed. The other half interest in the Olympic Apartments was traded for a farm in Pierce county, also mortgaged. This mortgage was later foreclosed, and with this property we are not concerned. In both these transactions, appellant is named as joint grantee. Appellant says that he gave Grow, as a part consideration for the Gillman addition property, mining stock worth \$600, and about \$100 in cash, and that he paid out of his own money over \$200 in installments to be applied on the mortgage. The stock was not shown to have had any value; it had never paid any dividends. The grantor does not seem to have been sufficiently impressed with its value to consider it a factor in the purchase price. While appellant's testimony as to the payments made by him is undisputed, it is also unsupported. It is probable that appellant furnished the money to make six payments of \$35.17 each, as he claims; no receipts were offered in evidence. Assuming, however, that appellant did expend the sums claimed to have been spent, the total amount would not exceed \$500. This, under the authorities cited, would not give him a community interest in the property. The conduct of the husband after the death of his wife is such as to warrant a belief that he did not at the time regard the property as his own. The beneficiary under the will met all payments due on the mortgage and in the way of taxes and assessments. He allowed her to proceed apparently on the theory that the property was the sole and separate property of her mother and that she was the sole devisee.

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Appellant contends that he is the owner of a community interest in virtue of the deeds. He is named as a common grantee. The testimony upon which the husband depends to show his interest in the property, as he claims it to be evidenced by the deed, is as follows:

"Q. Do you recall how the deed came to be given to Mr. and Mrs. Deschamps, both names being mentioned here? You may have forgotten it, Mr. Grow, I will submit it to you. It is 'Exhibit B' and this is your signature, J. A. Grow? A. Yes. Q. And I call attention to the body of the deed which makes the grantees Samuel Deschamps and Anna Deschamps. Now do you recall anything about why that was? A. Why, as we were going down to get the deed signed up, Mr. Deschamps asked Mrs. Deschamps if she was willing for his name to appear in the deeds both the same, and she said Yes, to have them; he wanted his name in the deed. That was about all there is to it."

Another witness testified as follows:

"I had a client that had two hundred acres over at Roy, Washington, and wanted to get into a rooming house. I was up there one evening at Mr. Deschamps' and Mrs. Deschamps' place and I submitted a proposition to them. So, of course, they says: 'Well, we will look into the matter.' So I brought my client up there to look at the house and after we got through looking through the house, we took a trip over to Roy, Washington, to look at the land. So when we got over there, why, coming back, why everything was satisfactory. We were going to take Mrs. Deschamps along with us at the time but she says the both of them cannot leave the house at the same time. So Mr. Deschamps went over there to look at the land and he explained it to her just as he saw it and, of course, they agreed to make the deal. So we made the deal. Q. Now, what talk, if any, had you with Mrs. Deschamps with reference to making the deal? A. Well, when we got through taking the invoice up at the house and we came down to—I asked them to come down to the office; I had my office at 605, Third Avenue, at that time . . . I asked them to come down to close up the deal. So when the time comes they were down at the time . . . so when the deed was drawn, I asked Mrs. Deschamps, . . . 'Now Mrs. Deschamps, do

you want this deed in your name or in your husband's?" I asked Mr. Deschamps first, 'Do you want this deed in your name?' He says, 'Ask my wife. Whatever she says.' . . . So she says, 'Why certainly,' . . . the property belongs equal between us both."

Appellant's main reliance is put upon the case of *In re Tresidder's Estate*, 70 Wash. 15, 125 Pac. 1034. In that case, the husband attended to the purchase of the property and there was much testimony to support the contention that the property was purchased with the separate funds of the wife. We held that the husband having taken the deed and having directed the insertion of the name of his wife as grantee, together with the recitation that the property was sold and conveyed to the wife "as and for her sole and separate property, use and benefit, and not as community property," was sufficient to bind the husband, and that we would not hear him in denial of his own act. In this case, the consideration paid for the property was almost, if not entirely, paid out of the property of the wife. It is not shown that the wife ever intended to give up a one-half interest in the property or that she understood that her husband could assert a greater interest in the property than would be represented by his advances, if any. The mouth of the wife is closed in death, and there is no one to speak for her unless it be the law, so often declared, that, where property standing in the name of either spouse, or in the name of both spouses, is presumed to be community property, such presumption is rebuttable and that courts will not be bound by the terms of the deed but will look beyond it and ascertain, if possible, the true intent and purpose of the parties. Having this principle in mind, and considering the whole record, we are not satisfied that the husband has made out a case that would warrant this or any other court in decreeing him to be the owner of a one-half interest in the property.

Certain personal property was involved in the trial below. The court in rendering its decision said:

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"In the matter of the estate of Anna Deschamps, deceased, the ruling of the court in that case is, that the real property described in the City of Seattle, was the separate property of the deceased. That the furniture was, of course, community property, and it being frittered away and lost, the executor of the estate will be held to account for it, and you may take testimony as to the value of it."

No testimony seems to have been taken as suggested by the court and no findings were made. The state of the record is such that we do not feel warranted in passing on the value of the personal property.

The judgment of the lower court is affirmed.

Crow, C. J., ELLIS, MAIN, and GOSE, JJ., concur.

[No. 11411. Department Two. January 23, 1914.]

MARY FELIX *et al.*, Respondents, v. ANASTUS YAKSUM *et al.*,
*Appellants.*¹

INDIANS—LANDS—ALLOTMENT—PATENTS—RESTRICTION UPON ALIENATION. A patent to an Indian containing no restriction upon alienation cannot be held to be the second patent conveying the land free from restrictions, which, under 23 Stat. 96, is to be issued after expiration of the twenty-five year period, where such period could not have expired when the patent was issued; since there is no authority to waive the limitation.

SAME—ALIENATION — RESTRICTIONS — EVIDENCE — SUFFICIENCY. A judgment declaring a parol gift by an Indian of land held subject to a restriction against alienation cannot be sustained on appeal, in the absence of anything in the record to show to what tribe the Indian belonged or when or under what law he made his homestead application, so as to determine what restrictions apply.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered January 3, 1913, upon findings in favor of the plaintiffs, in an action for equitable relief. Vacated and remanded for further evidence.

¹Reported in 137 Pac. 1037.

Charles F. Wallace, Williams & Corbin, and Reeves, Crollard & Reeves, for appellants.

Kemp & Baker, for respondents.

PER CURIAM.—Action to declare a parol gift of land. The pleadings below were framed upon the issue of gift from Anastus Yaksum to the respondent Mary Felix, and a subsequent quitclaim deed from Anastus Yaksum to the other appellants. Findings were made sustaining the gift, subject to a life estate in Anastus Yaksum, and this appeal followed.

The first point urged by appellants in this court is that all of the parties to this action are Indians, and that the title of Anastus Yaksum to the land in controversy is subject to a restriction against alienation, and for this reason the gift, though established, cannot be upheld. This point must first be determined before we can pass to the question of a gift; for it is clear, if Anastus Yaksum held this land under a restriction against alienation, no gift made by her within the period of alienation can be sustained. This question being here suggested for the first time, we are unaided by the record in attempting its solution. Ordinarily, whatever may be suggested in cases triable here *de novo*, we look to the record made below for the facts upon which our determination must rest, and base our findings upon the evidence or lack of evidence. But this is an exceptional case. We are dealing with the questioned rights of Indians to hold and convey real estate, and as Indians are recognized as wards of the nation, it is the duty of this court, and every other, to uphold those barriers which the Federal government has seen fit to establish against their impoverishment by withholding from them the power of alienation. The patent conveying the lands in controversy was issued February 3, 1908, to "Anastus Yaksum, widow of Yaksum." It contains no restriction whatever against alienation. The gift under which respondents claim was made in the spring of 1908, the exact date not being shown. The deeds under which appellants Kami Sam and

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Josephine Sam claim were made in July, 1912. Both of these dates would fall within the restrictive period, whatever be the one applicable to the title of Anastus Yaksum, if her title is subject to such limitation. The act of March 3, 1875, 18 Stats. at Large, 420, extending the privilege of the homestead laws to Indians who had abandoned their tribal relations, fixed the period of alienation at five years. The act of July 4, 1884, 23 Stats. at Large, 96, enlarged this period to twenty-five years. *Frazee v. Piper*, 51 Wash. 278, 98 Pac. 760.

In speaking of this last statute it was observed, in *Frazee v. Spokane County*, 29 Wash. 278, 69 Pac. 779, that it provided for the issuance of two patents; one when a person, entitled to it under the act, had consummated his right, and which patent should declare a trust under which the United States would hold the land for the period of twenty-five years for the sole use and benefit of the patentee and his heirs; and the other, to be issued upon the expiration of twenty-five years, conveying the whole title discharged of the trust and of all charge or incumbrance whatsoever. Respondents now urge that the patent issued to Anastus Yaksum, since it contains no restrictive clause, is the second patent referred to in the act of 1884, whereby the land is conveyed discharged of the trust. The weakness of this argument is manifest from the fact that the township in which these lands are situate was not surveyed until 1884, making it impossible for the twenty-five year trust period to have expired in February, 1908, when this patent was issued. The patent, therefore, it seems to us, shows upon its face that it is not the second patent referred to in the act of 1884. There is another act not referred to in the briefs, that of August 4, 1894, which made provision for allotments in severalty to members of the Wenatschapam tribe residing along the Wenatchee river, under the act of February 8, 1887, as amended by the act of February 28, 1891. These acts may be found in vol. 1, Indian Affairs, Laws & Treaties (2d ed.), pages 33, 56, 580.

Under these acts, the restriction against alienation was fixed at twenty-five years. From the location of these lands within the territory covered by these acts, it is not improbable that they are the proper ones to apply to the situation before us. However, because of the imperfections of the testimony, it is impossible to say with any degree of accuracy. The difficulty is there is nothing to show to what tribe of Indians Yaksum belonged, or when and under what law he made his homestead application. Nor do we know what, if any, effect to give to § 6 of the act of February 8, 1887, according citizenship to Indian allottees who have complied with certain conditions. Nor is it of any determinative force that the patent contains no restriction against alienation. The law becomes a part of the patent, and no Federal official can waive or render inoperative, because of the failure to incorporate it, any limitation which Congress has imposed upon the title. *Frazee v. Spokane County, supra*.

We have, therefore, made no attempt to review the case submitted to the lower court, since we must first reach a conclusion on the question here first submitted and upon which the record is practically silent. The only order we can make is to set aside the judgment and send the case back for a new trial, when we trust counsel will appreciate the questions involved in the case and make a record accordingly. Appellant will not recover costs in this court.

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Opinion Per PARKER, J.

[No. 11468. Department Two. January 23, 1914.]

CARL YTTREGARD, *Appellant*, v. ANDREW YOUNG *et al.*,
Respondents.¹

HIGHWAYS—NEGLIGENT USE—AUTOMOBILES—ACTION FOR DAMAGES—INSTRUCTIONS. In an action for personal injuries sustained when plaintiff's horse took fright from defendant's automobile, consideration of the charges of negligence (1) in running the automobile at an excessive speed, (2) cutting out the muffler, and (3) trying to pass on the wrong side, is not excluded by an instruction to the jury that the only acts of negligence on which there was any evidence are first, on the question whether defendant failed to stop on signal and, second, whether the defendant on first discovering the fright of the horse, failed to act as a reasonably prudent man should have acted, and failed to reduce the speed and failed to use reasonable care etc.

Appeal from a judgment of the superior court for Kitsap county, French J., entered May 3, 1913, upon the verdict of a jury rendered in favor of the defendants, in an action for personal injuries sustained in a collision with an automobile. Affirmed.

C. J. Smith and *Heber McHugh*, for appellant.

Van Dyke & Thomas, for respondents.

PARKER, J.—The plaintiff seeks recovery of damages from the defendants for personal injuries which he claims resulted to him from the negligent driving of their automobile. On August 5, 1912, the defendants were driving their automobile along a public road, in Kitsap county, approaching a horse and wagon going in the same direction, driven by a young man with whom the plaintiff was riding. Upon the approach of the defendants' automobile to the wagon, the horse became scared, and, in a measure, unmanageable for a few moments, when the plaintiff fell, or was thrown, from the wagon and received the injuries he sues to recover for. A trial before the

¹Reported in 137 Pac. 1043.

court and jury resulted in verdict and judgment in favor of the defendants, from which the plaintiff has appealed.

The substance of the contention made in behalf of appellant is that the trial court, by its instructions, in effect, excluded from the consideration of the jury certain alleged acts of negligence on the part of respondents which there was evidence tending to show. In appellant's brief, it is asserted:

"There were five grounds of negligence alleged, and evidence given in support of each: (1) running the automobile at an excessive rate of speed; (2) cutting out the muffler when near the horse; (3) trying to pass on the wrong side; (4) failure to stop on signal; (5) failure to use proper caution when first observing that the horse was afraid of the automobile."

The first, second and third grounds of negligence so claimed by counsel for appellant, it is insisted, were excluded from the consideration of the jury by the fifth instruction given by the court, reading as follows:

"You are further instructed that the only acts of negligence on the part of the defendants on which there has been any evidence whatsoever, is, First: On the question of whether or not the plaintiff in this case, at or about the time his horse became frightened, signalled to the defendant to stop his machine, and if the defendant failed to stop the machine within a reasonable time after receiving such signal, if you believe from the testimony that said signal was so given, and second: Whether or not the defendant on first observing that the horse behind which plaintiff was riding was frightened, failed to act as a reasonably prudent man should have acted under the circumstances, that is, failed to reduce the speed of the car and failed to use such care as a reasonable and prudent man should have used under all the circumstances."

Assuming, for argument's sake, that there was competent evidence introduced tending to show negligence in these particulars, we are still unable to see that this instruction excluded consideration of such specific acts of negligence, in view of the comprehensive language of the second portion of the instruction. That language, it seems to us, had the effect of

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submitting to the jury every possible act of negligence that the respondents might have been guilty of; except, possibly, negligence they might have been guilty of before seeing that the horse was frightened and before appellant signalled to them to stop their machine; and we think it clear that there was no evidence tending to show negligence on their part before that time. We are of the opinion that appellant had a fair trial, and a reading of the entire record impresses us with the belief that it would hardly have been possible for the jury to find otherwise than as they did.

The judgment is affirmed.

CROW, C. J., MOUNT, FULLERTON, and MORRIS, JJ., concur.

[No. 11472. Department Two. January 23, 1914.]

In the Matter of the Estate of ANDREW A. HEDEMARK.

F. L. STEWART, *Administrator, Appellant*, v. J. T. GEAR,
*Guardian, et al., Respondents.*¹

HOMESTEAD—FOR SUPPORT OF MINOR CHILDREN—RESTRICTIONS—STATUTES—CONSTRUCTION. The homestead to be set aside, under Rem. & Bal. Code, § 1465, for the use of the widow and minor children of the deceased, where he, in his lifetime, failed to select one, cannot be awarded from his separate property to his children in fee, there being no widow; since the land descends to his lawful heirs, subject to debts and the children's rights, which would be the same as the widow would have taken had she filed a declaration, and since the court is only authorized to set aside a homestead for the widow and children "for a limited period," with an allowance for support.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered June 8, 1913, setting aside a homestead for minor heirs, after a hearing upon stipulated facts. Reversed.

McKenney & Brush, for appellant.

B. L. Hubbell, for respondents.

¹Reported in 137 Pac. 1031.

MOUNT, J.—This appeal is from an order of the superior court for Cowlitz county, setting apart in fee certain real property as a homestead for the minor heirs of Andrew Hedemark, deceased.

The facts are stipulated. It appears therefrom that Andrew Hedemark died, intestate, in February, 1912. At the time of his death, all the real and personal property belonging to the estate was his separate property. He left surviving him six children, four of whom are minors. At the time of his death, he owned certain real property in West Kelso, Washington, upon which he resided with his children. He had never filed a declaration of homestead. In May, 1912, after the appointment of an administrator, the superior court of Cowlitz county made an order setting aside the premises in question to the minor heirs, to be used by them during the settlement of the estate, and at the same time made an allowance of \$20 per month out of said estate pending the settlement thereof. A large number of claims have been filed against the estate by creditors. The assets of the estate will probably not be sufficient to satisfy these claims.

The premises are incumbered by a mortgage of \$1,700 which with interest, amounts to \$1,900; and subject to the mortgage the premises are worth less than the sum of \$1,000.

In April, 1913, J. T. Gear, who had theretofore been appointed guardian of the minors, filed a petition to have the property in controversy set aside in fee as a homestead for the minor heirs. The adult heirs renounced all interest in the premises in favor of the minors. At the time of filing this petition, the guardian also filed a declaration of homestead, claiming the premises as a homestead for the minor heirs. The court thereafter made an order setting the premises apart to the minor heirs in fee, and releasing the same from administration and all claims against the estate. The administrator has appealed from that order.

The only question presented upon this appeal is whether the lower court had authority under the statute to set aside the

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premises in fee to the heirs as a homestead. Questions similar to the one here presented were before this court in *Austin v. Clifford*, 24 Wash. 172, 64 Pac. 155; *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116; and *In re Lloyd's Estate*, 34 Wash. 84, 74 Pac. 1061. In *Stewin v. Thrift*, *supra*, we quoted in full all the statutes bearing upon the question, and there said:

"But we said in *Austin v. Clifford*, 24 Wash. 172 (64 Pac. 155), that these sections must be read and construed in connection with the general homestead act of 1895, and, so reading and construing them, it would seem that §§ 6219 and 6222 had been in part superseded by that act. It will be noticed that the tenure by which a homestead is held by the survivor of a community is made to depend upon the nature of the title to the land from which the homestead is selected. If it is selected from community property in the lifetime of both spouses, it vests in the survivor in fee, and becomes his or her separate property; if it is selected from separate property, it goes, on the death of the person from whose property it was selected, to the heirs or devisees of such person, subject to the power of the court to assign it for a limited period to the family of the decedent. Now, § 6219 provides that, if the head of the family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, his widow may comply with such provisions, 'and shall be entitled on such compliance to a homestead as now provided by law for the head of the family;' that is to say, if she makes the selection from what was formerly the community property of herself and husband, she takes title thereto in fee, to the exclusion of the children, minors as well as adults; if she selects from her late husband's separate property, she takes a limited estate, the duration of which is fixed by the court having jurisdiction over the estate."

And *In re Lloyd's Estate*, *supra*, we said:

"The logic of the opinion in the case of *Austin v. Clifford*, *supra*, shows plainly that, under the facts as stated therein, the widow had no permanent homestead rights or estate in the deceased husband's property; that it descended to his heirs at law, including the widow.

"Applying this rule to the proceedings at bar, it must necessarily follow that the realty in question, on the death of

Michael Lloyd, vested in his lawful heirs, subject to the lawful rights and claims of creditors, and all parties interested, in the regular course of administration. See, further, *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116. If the contentions of appellant's counsel be correct, no matter how valuable the homestead of decedent may be, it must go to his widow or children, to the exclusion of the rights of his creditors. This would have the effect of enlarging the homestead rights of the widow and children, by reason of the death of the husband. We cannot give our statutes on this subject any such forced construction. The filing of the appellant's homestead declaration after the death of her husband can have no such effect. Section 5246, *supra*, refers to the selection of the homestead, made prior to the death of either spouse."

It is plain, under the provisions of Rem. & Bal. Code, § 1465 (P. C. 409 § 325), which is Ballinger's Code, § 6219, referred to in *Stewin v. Thrift*, *supra*, that the child or children therein mentioned take the same as the widow; they obtain no greater right by the subsequent homestead declaration than the widow. The logic of the decisions above referred to is, that the children of Andrew A. Hedemark obtained no greater interest in the estate of their father by reason of the homestead declaration than the widow would have obtained had she filed such declaration; and that the effect of such declaration was to authorize the court to set aside the homestead for a limited period, as was said in *Stewin v. Thrift*, *supra*, "perhaps during his minority," and did not authorize the court to set aside the homestead in fee to the minor children. The order of the lower court setting aside the homestead to the minor children in fee was therefore error, because the power of the court is limited to setting aside such homestead for a limited period, with an allowance for their support.

The order must therefore be reversed.

Crow, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11072. Department Two. January 23, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Chicago,
Milwaukee & Puget Sound Railway Company,
Respondent, v. PUBLIC SERVICE COMMISSION
et al., Appellants.*¹

RAILROADS—FACILITIES—SIDE TRACKS—DEMAND—SUFFICIENCY. The sufficiency of a demand for side track connections cannot be questioned by a railroad company, where it appears that, after some correspondence, its general counsel absolutely refused to entertain further negotiations looking to the installation of any kind of a spur track at or near the point in question, and its division superintendent testified that he would not have recommended any kind of a spur there, and none would have been put in except on his recommendation, and no objection was made by the company to the form or sufficiency of the demand.

SAME — FACILITIES—SIDE TRACKS — COMPULSORY INSTALLATION—CONSTITUTIONAL LAW—DUE PROCESS OF LAW. The public service commission law, 3 Rem. & Bal. Code, §§ 8626-13, 8626-62, providing that, upon denial by a railroad company of a shipper's application for a switching connection, the public service commission, upon due hearing, may compel the company to provide, on its own right of way, at the cost of the shipper and others using it, a side track and switching connection if reasonably practicable and the business therefor is sufficient to justify it, is not unconstitutional as depriving the company of property without due process of law; since the spur is to be built entirely on land of the company held for public use, there is a full hearing, and the spur is to be paid for by others, and is open to the use of all shippers on reasonable terms.

SAME—PUBLIC USE—SIDE TRACKS. A spur track intended primarily for the immediate use of a single shipper, open upon reasonable terms to the use of the public, is a public use.

SAME — REGULATION — SIDE TRACKS — INTERFERENCE WITH INTERSTATE COMMERCE. Whether an order of the public service commission requiring the installation of industrial side track connections interferes with interstate commerce is a question of fact, and it will not be so held where the evidence falls to show any appreciable effect upon interstate business, and it appears that the spur is reasonable and practicable, and can be operated with reasonable safety.

¹Reported in 137 Pac. 1057.

Appeal from a judgment of the superior court for Thurston county, Yakey, J., entered January 14, 1913, vacating an order of the public service commission ordering side track facilities, after a hearing on the merits. Reversed.

The Attorney General and Stephen V. Carey, Assistant, and Short & Gleysteen and J. H. McDaniels, for appellants. F. M. Dudley, for respondent.

ELLIS, J.—This is an appeal from a judgment of the superior court of Thurston county, vacating an order of the public service commission requiring the respondent railway company to build and install, at the expense of the applicants, Miller & Short, a side track connecting with the main line of the railroad company at a point about .59 miles northwest of the flag station of Whittier, in Kittitas county. For convenience, we will, throughout, designate the parties as “appellants” and “respondent.”

The appellants, Miller & Short, own certain timber lands, northwest of Whittier, and crossed by respondent's railway. They also own and operate a mill at Cle Elum, on the Northern Pacific railroad, which can only be reached by shipping over respondent's road to Easton, and thence, over the Northern Pacific road to Cle Elum. In 1910, they made application to the respondent for the construction of a spur partially on the right of way and partially on the appellants' land. The railroad company, after repeated renewals of the request for the spur, finally, on August 31, 1911, refused the request, and the appellants filed their complaint with the public service commission. After a hearing, on due notice, the public service commission made findings of fact substantially as follows: That the complainants, Miller & Short, are the owners of about ten million feet of standing timber in the east half of the northwest quarter and the west half of the northeast quarter of section 22, township 21, north, range 12, east W. M., in Kittitas county, through which tracts the defendant's railway runs, and that the complainants had been

shipping over the defendant's line from Whittier to Easton; that the complainants' timber lies principally on the east side of the tract; that the nearest point on defendant's road at which complainants can load their timber is at Whittier; that the complainants' land east of the track is lower than the railroad track and, in moving the timber to Whittier, it is necessary to haul it over a heavy grade, cross the track, and then on another grade nearly a mile to Whittier, the total distance being from one to two miles; that it is impossible to haul the heavier timber on trucks to the station; that the cost of hauling in the manner necessary at present is \$1.50 to \$2 per thousand feet in excess of what it would cost with more convenient loading facilities; that, in January, 1910, the complainants applied to the defendant company for a loading spur on the northeasterly side of defendant's track, near the center of section 22, on the defendant's railroad, about .59 miles from Whittier; that this was finally rejected by defendant August 30, 1911; that the spur asked for would pass over defendant's right of way for several hundred feet, then onto complainants' land, being about 1,500 feet in length; that defendant refuses to install the spur requested, claiming that the present facilities are adequate and that the proposed spur would be impracticable and undesirable. The commission further found that the present loading facilities at Whittier are inadequate, and that, by reason of the poor roads and steep grades over which complainants have to haul, it is impossible to load the largest timber; that complainants intend to ship three cars a day during the logging season, weather permitting, if the spur is installed; that complainants are now paying from Whittier to Easton \$1 per thousand feet freight charge, with a minimum of \$7 per car; that the United States has a large amount of mature timber for sale on land near complainants which is not now salable because of the difficulty of shipping it, and which could be shipped were the proposed spur installed; that defendant's right of way is 100 feet wide, and that there is ample room

on which to construct the loading spur on the right of way; that complainants need a loading spur about 300 feet long near the point mentioned, which would cost \$575. The commission found this cost by items, and found that the complainants were ready and willing to pay it; that two weeks time is a reasonable time to allow for the construction of such spur; that such spur is reasonable and practical, can be put in and operated with reasonable safety; and that there is sufficient business to justify the installation of the spur without considering the timber held for sale by the United States government. A reading of the record convinces us that these findings are sustained by ample evidence. Upon these findings, the commission, on October 7, 1912, made an order which, omitting caption and immaterial parts, reads as follows:

"This cause having been regularly heard and considered and The Public Service Commission of Washington having made and filed its findings of fact herein, and being fully advised in the premises:

"Now orders, that the defendant, Chicago, Milwaukee & Puget Sound Railway Company be, and it is hereby required within the time and upon the conditions hereinafter stated, to construct a spur track three hundred feet in length from head block to end of spur entirely upon its own right of way for the use of the complainants and such other persons and corporations as may be entitled to the use thereof. Said spur track shall be located on the northeasterly side of defendant's main track at a point near the center of section 22, township 21 north, of range 12 east W. M. in Kittitas county, Washington, and fifty-nine one-hundredths (59-100) of a mile east of the station of Whittier.

"Within fifteen days from the date of this order, the complainants shall pay to the defendant the sum of five hundred seventy-five dollars in cash to cover the cost and expense of constructing said spur track, and the defendant shall within thirty days from and after the payment to it of said sum construct said spur track as hereinbefore provided.

"This order is made upon the condition that any person or corporation other than the complainants shall be entitled to connect with said spur or use the same, upon the payment

to the complainants of a reasonable proportion of the cost thereof to be determined by this commission after notice to the interested parties, provided that such connection can be made without unreasonable interference with the rights of the said complainants."

Thereupon the respondent instituted proceedings in the superior court of Thurston county to review the order of the commission. On that review, the respondent contended, and the trial court held: (1) that the evidence failed to show a sufficient demand on the appellants' part to install the spur as ordered by the commission, in that the demand was for a spur 1,500 feet long and partly off the right of way; (2) that the statute requiring railroad companies to install such side tracks is unconstitutional; (3) respondent now also contends that the order is an undue interference with interstate commerce. This appeal is prosecuted by the original applicants for the spur, and presents these three questions for our consideration.

I. The demand, as made, and the refusal of the respondent, is evidenced by a considerable volume of correspondence which we deem it unnecessary to set out in full. It culminated in a letter of August 30, 1911, from the general counsel of respondent to the attorneys for appellants, which reads as follows:

"Your letter of July 20th, referring to your application for a spur track, to be used for loading logs about one mile west of Whittier station, has been considered by the officials of the railway company and has been referred to me for reply.

"It appears that since the extension of the industry track or set-out track at Whittier station, by lengthening it and connecting it at each end with the passing track, reasonable facilities for loading logs have been afforded at that station. The physical condition of the ground is such as to facilitate the loading of logs onto cars. It should not be expected that the railway company will provide, at any point on its railroad where shippers may desire to load logs, spurs for such purpose; particularly, in a case where, as here, reasonable facilities exist at a station.

"It is not desirable to cut the main line for temporary spurs as would be the one you are asking for.

"After consideration of all these matters, and of the present facilities, the railway company has decided to decline the application of Miller and Short for the installation of a spur loading track at the proposed location."

It is too clear for cavil that this letter was, in effect, and was intended to be, an absolute refusal to entertain further negotiations looking to the installation of any loading track or spur of any kind at or near the point in question. Moreover, the testimony of the superintendent of the respondent's coast lines was to the effect that he would, in no event, have recommended the installation of any spur of any kind at the point in question, and that, in the absence of such a recommendation by him, no spur would have been authorized. The respondent is in no position to question the sufficiency of the demand while expressly admitting that a demand such as it now claims would have been sufficient would not have been met in any event. The demand as made was sufficient to include everything ordered. The refusal was not based upon the fact that the demand went beyond the terms of the statute. To hold that the demand and refusal must take the exact form and terms of the order as finally made by the commission would be to render the statute ineffective in its practical operation. We deem it more consonant with reason and the plain purpose of the statute to hold that the right to insist upon a demand of the exact thing ordered may be waived by the failure to question the sufficiency of the demand when it is made, as in other cases where demand, tender, and the like are required as antecedent to a right of action. This court, in common with other courts, has held that, in such cases, the requirement is met by proof of facts showing that any different demand or tender from that made would be useless.

"We think it is the general rule that a demand is never necessary where it would be unavailing, if made." *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508.

See, also, *Chappell v. Woods*, 9 Wash. 134, 37 Pac. 286.

"It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes." *Hills v. Exchange Bank*, 105 U. S. 319.

See, also, *St. Louis & S. F. R. Co. v. Richards*, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032.

II. The respondent contended, and the trial court held, that the statute upon which the order of the commission was based is void as violative of article 1, § 3 of the constitution of the state of Washington, which declares "no person shall be deprived of life, liberty, or property without due process of law," and is violative of § 1, of the 14th amendment of the Federal constitution, which declares "nor shall any state deprive any person of life, liberty or property without due process of law." The argument proceeds upon the theory that such a side track as that provided for by the statute is private and that the use contemplated is a private use; that the right of way of the railroad company is its private property and that the taking of private property for a private use is the taking of property without due process of law. The statutory provisions under which the proceedings here in question arose are found in the public service commission law, Laws of 1911, ch. 117, page 538 *et seq.* Section 13 of that law is as follows:

"A railroad company upon the application of any shipper shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railway or private side track owned, operated or controlled by such shipper, and shall upon the application of any shipper, provide upon its own property a side track and switch connection with its line of railway, whenever such a side track and switch connection is reasonably practicable, and can be

put in with safety and the business therefor is sufficient to justify the same." (3 Rem. & Bal. Code, § 8626-13.)

Section 62, conferring upon the commission powers intended to be adequate to compel public service companies to discharge the duties imposed by § 13 and other sections of the act, reads as follows:

"Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that application has been made by any shipper for a switching connection or connections with a lateral line of railway or private side track owned, operated or controlled by such shipper, or that application has been made by any shipper for the installation of a side track upon the property of such railroad, and that such switch connection or side track is reasonably practicable, can be put in with reasonable safety, and the business therefor is sufficient to justify the same, and that the railroad company has refused to install or provide the same, the commission shall enter its order requiring such connection or the construction of such side track: *Provided*, Such shipper so to be served shall pay the legitimate cost and expense of constructing such connection or side track as shall be determined in separate items by the commission, and before the railroad company shall be compelled to incur any cost in connection therewith the same shall be secured to the railroad company in such manner as the commission may require. Whenever such lateral line of railway, private side track or side track upon the property of the railroad company shall be constructed under the provisions of this section, any person or corporation shall be entitled to connect therewith or use the same upon payment to the shipper incurring the primary expense of a reasonable proportion of the cost thereof, to be determined by the commission after notice to the interested parties: *Provided*, That such connection can be made without unreasonable interference with the right of such shipper incurring the primary expense." 3 Rem. & Bal. Code, § 8626-62.

These are the provisions which the respondent attacks as unconstitutional. A careful consideration of these statutory provisions makes it plain that any order of the commission following the terms of the statute is impressed with the fol-

lowing characteristics: The spur is to be built entirely upon the right of way of the railroad company, which is held for railroad uses. The order can be made only after notice to the railroad company, and a full investigation into the facts upon a written complaint filed for the purpose. The spur, though constructed by the railroad company, is to be paid for by the shippers who use it. The spur, though intended for the immediate use of a particular shipper or shippers, is open to the use, upon reasonable terms, of all shippers who may desire to use it. No court, so far as we are advised, has ever held that an order made under statutory authority, for a spur track impressed with all of these characteristics, was a taking of property without due process of law, or a taking of property purely for a private purpose.

The respondent relies mainly upon two decisions of this court involving the obligation of railroad companies to build spurs for the accommodation of industries. In the first case, *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.*, 32 Wash. 218, 73 Pac. 388, it was held that a railroad company could not be required, under the statutes then in force, to extend its track over lands which it did not own a distance of some 250 feet to a warehouse located beyond the end of the track. It appeared that the railroad company had never followed the policy of furnishing similar facilities to other shippers in the same line of business. The only constitutional question presented was that relating to section 15, of article 12, of the state constitution, forbidding discrimination by common carriers, and section 22, of the same article, prohibiting contracts between companies limiting the production, or regulating the transportation of any product or commodity. It was held that these sections of the constitution were not self-executing, and that the application for the track extension was not within the terms of the statute passed pursuant to these constitutional provisions. No question touching the due process clause of the constitution, either state or Federal, was involved.

The second case was that of *Northern Pac. R. Co. v. Railroad Commission*, 58 Wash. 360, 108 Pac. 938, 28 L. R. A. (N. S.) 1021, known as "The Burnham Spur Case." In that case, Burnham, the applicant for the spur, owned and operated a sawmill tributary to the line of the railroad company at a point between the stations of Rainier and McIntosh, about 300 feet distant from the main line of the railroad. The company refused to construct the spur, and the mill owner appealed to the railroad commission under the then existing railroad commission law. The commission, after a hearing, ordered the railroad company to build a spur from its main line across its right of way and over certain private lands to the mill. The order required the applicant to do the grading and furnish the ties, but that all other expense should be borne by the railroad company. The superior court sustained the order, and an appeal was taken to this court. In reversing the decision of the trial court, this court said:

"The order makes no provision for a right of way, and the evidence does not disclose who owns the land over which the spur track is to be constructed . . .

"The appellant contends that the order is a taking of its property without due process of law, and that it contravenes the fourteenth article of amendment to the Federal constitution. We think this view must prevail. The sawmill is a private industry, and the effect of the order is to take the private property of the appellant and devote it to the private use of Burnham. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 68 L. R. A. 820."

The opinion, after discussing certain decisions of the supreme court of the United States, to which we shall presently refer, concludes as follows:

"However desirable it may be for Mr. Burnham and others engaged in a like business to have switches and sidings extended to their mills, the fourteenth amendment to the Federal constitution, as construed by the highest Federal court and by this court as well, presents an insuperable barrier against compelling such accommodations.

Jan. 1914]

Opinion Per ELLIS, J.

"The contention of the attorney general that the order is promotive of the public convenience, and within the recognized police power of the state, cannot be upheld. We are persuaded, upon both principle and authority that the Burnham mill is a private business, and that an order requiring the railroad company to extend a switch or spur track beyond its right of way to afford him better and cheaper shipping facilities, is, in substance and effect, requiring the company to devote its property to the private use of another, and is within the protective clause of the Federal constitution."

From the parts of the opinion which we have quoted, and, in fact, from the entire opinion, it is manifest that the real holding of the *Burnham* spur case, when confined to the facts there involved, went no further than this: that, where an order of the state railroad commission seeks to compel a railroad company, at its own expense, in whole or in part, to build a spur track off of its own right of way and over private property for the exclusive use of a single shipper, which spur does not become the property of the railroad company, and cannot be open to the public use, because located on private property, such an order amounts to the taking of private property for a private use, and therefore, contravenes the guaranty of both the state and the Federal constitutions against the taking of private property without due process of law. Such a holding is, in no sense, determinative of the question here presented. That case does not hold that a railroad company may not lawfully be required, after hearing on notice as to the necessity and reasonableness of the application, to build entirely upon its own right of way, and at the expense of the applicant, a side track, giving to a private industrial plant access to the railway without which such private industry would be deprived of any practical participation in the public service to which the railroad is devoted, such a spur, when so constructed, to be open to the use of all members of the public on payment of an equitable proportion of the cost. The decision in the

Burnham case was rested mainly upon the decision of the United States supreme court in *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403; and *Missouri Pac. R. Co. v. Nebraska*, 217 U. S. 196. In the first of those cases, the Nebraska state board of transportation, assuming to act under a statute prohibiting railroads from giving undue preferences or indulging in discrimination between shippers, made an order requiring the railroad company to grant to certain applicants the privilege of erecting and maintaining a private grain warehouse upon the railroad right of way. The supreme court of Nebraska construed the statute in question as authorizing the order. The supreme court of the United States held the statute so construed unconstitutional, using the following language:

"The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way . . .

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property

of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

It will be noted from the above quotation that the court was careful to limit the language used to the facts there presented. The scope of the decision is also guarded and circumscribed by the following language found therein:

"Nor does it [the record] present any question as to the power of the legislature to compel the railroad company itself to erect and maintain an elevator for the use of the public; or to compel it to permit to all persons equal facilities of access from their own lands to its tracks, and of the use, from time to time, of those tracks, for the purpose of shipping or receiving grain or other freight."

The offense of the statute lay in the fact that the warehouse, being a private warehouse, would not be open to the use of the public on equal terms. The railroad company would thus be required to relinquish all control over a part of its right of way to private individuals. The warehouse, when constructed, could not be used by the railroad company in aid of its public service. In the case before us, no such situation is presented.

After the last mentioned decision, the legislature of Nebraska passed a statute which required every railroad company, upon application, at its own expense, to construct and maintain a spur track on its right of way to reach every grain warehouse located on land contiguous thereto. The second case above referred to, *Missouri Pac. R. Co. v. Nebraska*, 217 U. S. 196, arose under that statute. Holding the law unconstitutional, the supreme court of the United States said:

"It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases, the initial cost is said to be \$450 in one and \$1,792 in the other; and to require the company to incur

this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay. . . .

"This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs and, possibly, without regard to place. . . . On the face of it the statute seems to require the railroad to pay for side tracks, whether reasonable or not—or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power . . .

"If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act . . . We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires."

It will be noted that these two decisions of the Federal supreme court denounced statutes of Nebraska different from each other, both of them essentially different from our statute, and as offending in particulars not to be found in our statute. The first Nebraska statute, though authorizing the order after notice and a hearing, was held to violate the due process clause because it sought to compel the railroad company to devote property acquired and held for its public purposes as a transportation company to a use purely private and wholly private in that the warehouse there in question was a private warehouse, owing no duty to the public and not open to the use or service of any one save its owners.

The second Nebraska statute presented a typical case of offense against the due process clause in that it purported to require any railroad in the state, at its own expense, and upon mere demand of the owner of any warehouse, to build a side track without any opportunity to be heard as to the necessity for the track or as to the reasonableness of the de-

mand. It was held unconstitutional, first, because it provided no indemnity for what it required; second, because, being general in terms, it made no distinction between reasonable and unreasonable demands; third, because it made no provision whatever for a hearing in advance as to the requirements in any particular case. After noting these things, the court was careful to limit the decision as an authority by stating what it did not hold. The opinion concludes:

"We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend by anything that we have said to prejudice a later amendment providing for a preliminary hearing and compensation, which is said to have been passed in 1907."

These two decisions may well be considered as ample authority for our decisions in the *Burnham* spur case, since the order there involved, though made after notice and a hearing, provided no indemnity to the railroad company for what it exacted, required the railroad company, at its own expense, to lay down its own rails upon property not its own but outside of its right of way, and neither the order nor the statute under which it was made contained any provision securing the use of the spur to the public on any condition equitable or otherwise. The statute here under consideration offends in none of these particulars.

Neither the supreme court of the United States nor of this state nor any other court, so far as we are advised, has ever held that a railroad company may not lawfully be required, after a hearing on notice as to the reasonableness of the application, to build upon its own right of way, at the entire expense of the applicant, a spur track giving to a private industrial plant access to the railway, without which such private industry would be deprived of any practical participation in the public service which the railroad com-

pany is bound to give to all members of the public on equal terms, such spur, when so constructed, to be open to the use of all members of the public upon payment of an equitable proportion of the initial cost and to be under the control of the railroad company, subject only to the same supervision and regulation of the state as that exercised over other parts of the railroad system. Such a spur is essentially a public spur. Such a use of the railroad right of way is essentially a public use, a devotion to legitimate railroad purposes. As said by the supreme judicial court of Maine, in a case involving the exercise of the right of eminent domain:

"The tests decisive of this question, as to whether a branch track of this character is to be constructed and operated for public or private purposes, deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one." *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387.

As said by the supreme court of Utah:

"The test is, will any and all persons and business institutions who may have occasion to do so be permitted to use it? That is, will the track be open to public use generally? If so, then it is a public utility." *Stockdale v. Rio Grande W. R. Co.*, 28 Utah 201, 77 Pac. 849.

As said by the supreme court of Iowa:

"And we think that it makes no difference that the mine-owner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small." *Philips v. Watson*, 63 Iowa 28, 18 N. W. 659.

And, as said by the supreme court of the United States:

"The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." *Hairston v. Danville & W. R. Co.*, 208 U. S. 598.

That a spur track intended primarily for the immediate use of a single shipper, but open upon reasonable terms to the use of all members of the public who may have occasion to use it, is a public use, is sustained by overwhelming authority. *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 88 Am. St. 918, 56 L. R. A. 240; *Chicago, B. & N. R. Co. v. Porter*, 48 Minn. 527, 46 N. W. 75; *De Camp v. Hibernia R. Co.*, 47 N. J. L. 48; *Butte, A. & P. R. Co. v. Montana U. R. Co.*, 16 Mont. 504, 41 Pac. 232, 50 Am. St. 508, 31 L. R. A. 298; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Railway Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 434; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *Hays v. Risher*, 32 Pa. St. 169; *Zircle v. Southern R. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. 805.

We can conceive of no sound reason to hold that a use sufficiently public to sustain the exercise of the delegated sovereign power of eminent domain by a railroad company to acquire a right of way as for a public use, would not be equally a public use as applied to a use for the same purpose of a right of way already owned by the railroad company. It is merely speciously correct to say that a part of the railroad's right of way is appropriated to the use of the special industry. If, as is undoubtedly true, the owner of the given industry, as a member of the public, has a right to participate in the public service to which the railroad and its right of way are devoted, and the spur when built is open to the use, on equal terms, of every other member of the public who

may desire to use it, then the part of the right of way so used is, on all authority, appropriated to a public use.

The case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820, has no application. That case merely held that a private logging road is not a public utility and hence the power of eminent domain cannot be exercised in aid of it. Under a later statute (Rem. & Bal. Code, §§ 7106-7109; P. C. 405 §§ 429-435), authorizing the organization of logging roads with the duty of general transportation of logs and other timber products, such a road is held to be a public utility, though its primary purpose is to conduct its own business as a logging company, and carry its own products. The mere fact that any member of the public may require the transportation of logs over the road on reasonable terms makes of it a public utility and, as such, capable of exercising the power of eminent domain. *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444. On the main principle, the case here is an exact parallel. The spur track, though primarily intended for the use of the applicant, will, when constructed, be open to the use of any member of the public desiring to use it. It will be just as much a public spur as that now found at Whit-tier. Both will be subject to the reasonable use of the public.

Such a side track as that contemplated by the statute and order here in question is, in no just sense, a mere private convenience any more than is the railroad itself. It is ancillary to, and in aid of the public service. The statute proceeds upon the just and reasonable theory that, as a part of the public service undertaken by a common carrier, there is a duty to permit every member of the public, at the entire expense, but also at the least expense of that member, to provide the means indispensable to a participation in the public service, whenever such means do not unreasonably interfere with the general service or operation of the public utility, and whenever such means so provided are open to the use of the public on equal terms. The public service is but the aggre-

gate of the service accorded to private enterprises and individuals. Any unreasonable restriction of the service as to any individual is, therefore, an unreasonable impairment of the public service. These considerations make it clear that the track, when built, becomes an integral part of the public utility, a portion of the railroad system. Nor does the fact that the initial cost, both of materials and of the construction of the spur, is to be borne by the person primarily to be served, deprive the spur of its essential character as an integral part of the public utility. This does not make it a private track, nor change the nature of its use. *Hairston v. Danville & W. R. Co., supra*. The statute expressly prohibits such a result by providing that, subject to an equitable division of the initial cost, the track is at the service of the public as much as is any other part of the railroad system. The owner of the industry primarily served has no control over the spur nor any interest in it other than the right of being served by it, and that right is shared equally by every other person who may desire to share it. The control of the railroad company over it is as complete as over any other part of its system and is subject only to state control or regulation under the general laws.

Only one court of last resort, so far as we are advised, has been called upon to consider the validity of a statute similar to ours. The statute of Wisconsin is like that of this state in nearly every essential particular save that, under it, the railroad may be required, at the expense of the applicant for an industrial spur, to acquire a right of way for the spur not exceeding two miles in length. The supreme court of that state, in sustaining the statute, uses language so clearly applicable to our own statute, that we quote from it at some length.

"It will be observed from the first subdivision of the section that four facts must co-exist before a railroad can be compelled to acquire a right of way, construct, maintain, and operate a spur track, namely: (1) the spur track must not

exceed two miles in length; (2) it must be practically indispensable to the successful operation of the existing or proposed plant, industry, or enterprise; (3) its construction and operation must not be unusually unsafe and dangerous; and (4) it must not be unreasonably harmful to public interest. The Legislature has delegated to the *Railroad Commission* the power to determine whether or not these four facts co-exist. If the *Commission* finds that they do, then, upon the statute being complied with, the railroad is required to build the track, otherwise not. The exercise of such power by the *Railroad Commission* is not the exercise of legislative power and may therefore be delegated to it. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Commission*, 137 Wis. 80, 117 N. W. 846; *Wayman v. Southard*, 10 Wheat. 1; *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.*, 145 Wis. 337, 129 N. W. 600.

"Plaintiffs challenge the constitutionality of the statute on the ground that the side tracks provided for are private, and that land taken for right of way for such side tracks is taken for a private and not for a public use, contrary to the provisions of sec. 13, art. 1, of the constitution of this state, and contrary to the provisions of the XIVth amendment to the constitution of the United States. If it be conceded that the side tracks are private, then the objections raised by plaintiffs must be deemed well taken. But the case of *Chicago & N. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, negatives such a concession. It was there held that the taking of land for a side track under sec. 1831a, Stats. (1898), was a taking for a public use, even though the side track ran to a single industry and the owners thereof were to bear a large part of the expense . . .

"Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the

less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it. And this is the crucial test as to whether or not the track is a private or public one. If it is open to the use of any one who may desire, upon equal or equitable terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of any one using it or the extent of such use. *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001. That such tracks are to be open to the use of the public generally is clearly evidenced by the statute, for it speaks of the industry *primarily* to be served and makes provision for others securing the same service by sharing in the initial cost, thus evincing a clear intent to subject the track, upon equitable terms, to the use of any one who may require it. Its operation, too, is subject to state control under general laws, and neither the railroad nor the owner of the industry can in any respect interfere with such control." *Union Lime Co. v. Railroad Commission*, 144 Wis. 523, 129 N. W. 605.

Every element found by the supreme court of Wisconsin as making the act constitutional, namely, indemnity, reasonableness, necessity, safety, right of public use, compatibility with public interest, and control by the railroad subject only to state control, is provided for, safeguarded and guaranteed by our own statute and the order here involved. We are constrained to hold that this statute is not violative of the due process of law clause either of the state or of the Federal constitution.

III. The respondent contends that the spur ordered will interfere with interstate commerce and hence the order is

void as in conflict with § 8 of article 1 of the Federal constitution. Whether the operation of the spur will so interfere is, of course, a question of fact. We have examined the evidence with care, and we think it wholly fails to show any such interference with the usual and ordinary operation of the road as to have an appreciable effect upon its interstate business. The commission found, on what we deem sufficient evidence, that "such a spur is reasonable and practicable and can be put into operation with reasonable safety." The trial court made no contrary finding, but tacitly accepted the findings of the commission on questions of fact. There is no merit in the argument that, if this spur can be established, then every industrial plant along the road may rightfully demand one. The answer is, of course so, if the demand, after a hearing on notice, be found reasonable in view of all the surrounding conditions, including safety and the number, proximity and accessibility of other spurs; and of course not, if, on such hearing, the demand be found unreasonable from any cause.

The order of the commission is sustained. The judgment of the trial court is reversed.

Crow, C. J., FULLERTON, MAIN, and MORRIS, JJ., concur.

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[No. 11057. Department Two. January 24, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v.

EDWARD H. WRIGHT, *Appellant*.¹

CONTEMPT—EVIDENCE—SUFFICIENCY. A conviction for contempt of court, in the use of language deemed contemptuous in written exceptions filed, is not sustained, where the language used was invited by the court in unnecessary criticism of accused's conduct outside the duty of the court, and both were to blame.

Appeal from a judgment of the superior court for Pacific county, Smith, J., entered November 29, 1912, upon a conviction of contempt. Reversed.

Welsh & Welsh, for appellant.

H. W. B. Hewen, for respondent.

PER CURIAM.—Appeal from an order adjudging appellant to be in contempt of court, and imposing a fine of \$100. We shall make no attempt to recite the facts in this case, nor make reference to the controversy which culminated in the order complained of, as it would be of no benefit to the parties interested or to the public at large. The beginning of the controversy culminating in the adjudication of contempt was a letter addressed to the court commissioner of Pacific county, which was received by the judge of the lower court, in which some complaint was made concerning the conduct of appellant in effecting a settlement of an estate then in process of probate. This letter was treated by the judge as a complaint, and citation was issued addressed to the appellant, to which a copy of the letter was attached indorsed, "A true copy of the complaint," citing appellant to show cause as to the matter complained of in the letter. Appellant visited the judge and represented to him what had been done in the estate and, at request of the judge, made and filed a written report. The court thereupon made

¹Reported in 137 Pac. 1198.

findings of fact and conclusions of law, in which he severely criticized appellant, to which appellant filed written exceptions, the language of which the court deemed contemptuous. Further proceedings were then had, resulting in the order complained of.

Whatever may have been said by appellant in the exceptions filed by him, was invited by the court in the unnecessary criticism made of appellant's conduct. If the court desired to make findings, a statement of the facts would have been sufficient, without a resort to condemnation. Appellant, on the other hand, went beyond an attempt to clear himself from the strictures made in the findings. Both were to blame, and evidently sought the occasion to express a mutual dislike. We will not say more; we would not have said what we have but for the requirement to give reasons for our decision. The above reasons are, in our judgment, sufficient, and the judgment is reversed and the cause remanded with instructions to dismiss the proceedings.

[No. 11284. Department Two. January 24, 1914.]

A. G. BELSHEIM, *Appellant*, v. FIRST NATIONAL BANK OF
WHITE SALMON, *Respondent*.¹

BANKS AND BANKING—DEPOSITS—CHECKS FOR COLLECTION—CREDITS—CONSIDERATION. Where a bank received a check for collection, and made a credit thereon for accommodation only, there was no consideration for the credit, and the bank is entitled to charge off the credit, when the collection failed through no fault of the bank; and merely advising a customer that payment of the check could be stopped by wire does not charge the bank with the failure of the collection.

Appeal from a judgment of the superior court for Klickitat county, McKenney, J., entered December 30, 1912, upon findings in favor of the defendant, in an action on contract tried to the court. Affirmed.

¹Reported in 137 Pac. 1055.

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Opinion Per MOUNT, J.

N. B. Brooks and *W. B. Presby*, for appellant.

J. L. Sutherland, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover the sum of \$1,500, deposited to the checking account of the plaintiff in the defendant bank; and, also, to recover \$500 damages by reason of the refusal of the defendant to honor the plaintiff's check against the deposit. The cause was tried to the court without a jury. Judgment was entered in favor of the defendant. The plaintiff has appealed.

On the trial of the case, the court found that a credit was given to the appellant on the books of the respondent bank in the sum of \$1,500; that this credit was a provisional credit for the accommodation of the appellant; that no consideration was paid or received for such credit; that the credit was cancelled and charged off from the appellant's account; and that the appellant drew upon the credit after knowledge of the cancellation thereof.

There is no serious dispute about the facts in the case. They are, briefly, in substance as follows. The appellant and one Wheeler were real estate agents, doing business in different places. They were not partners. One Frank Moore had listed a tract of land for sale with these agents. The price of the land was \$8,000. It was agreed that the agents should receive as their commission what they might obtain for the land above the \$8,000.

Thereafter, Casper W. Hodgson, a resident of New York, agreed to purchase the property at the price of \$10,000. The contract of sale was closed on August 8, 1911, and Mr. Hodgson drew his check on a bank in New York city, payable to the order of the respondent, in the sum of \$8,900, which was the balance of the cash payment to be made upon the purchase price. Thereafter, on August 23d, a deed and mortgage securing the balance due were deposited in escrow in the respondent bank, to be delivered upon pay-

ment of the check. The respondent bank received the check for collection only, and forwarded the same to New York for payment. Afterwards, on the same day, the appellant requested the bank to pass to his credit the sum of \$1,500, and to the credit of Mr. Wheeler the sum of \$450, being the amounts claimed as commissions upon the sale of the land. The appellant was then informed by the officers of the respondent bank that the proceeds of the Hodgdon check had not been received. The appellant then assured the officers that there would be no trouble about the collection of the check. Thereupon the bank passed to the credit of the appellant \$1,500, and to the credit of Mr. Wheeler \$450.

On the next day, Mr. Wheeler went to the respondent bank and stated that he was not satisfied with the division of the commission which the appellant had made, and asked the officers of the bank if the payment of the check could not be stopped. He was informed that it could be. Mr. Wheeler thereupon caused the payment of the check to be stopped, and the bank was notified by wire from New York of that fact. Mr. Wheeler also notified the bank that payment of the check had been refused. Thereupon the respondent bank cancelled the credits given on account of the check, and notified the appellant thereof. Afterwards, on October 18, 1911, the appellant drew his check upon the respondent bank for the sum of \$1,500, and payment was refused. The Hodgson check was never paid, and no money passed through the bank on account of the transaction. On November 18, 1911, this action was brought by the appellant against the bank.

A mere statement of the facts shows clearly that the appellant was not entitled to recover. It is plain that the credit which was given by the bank to the appellant was for the accommodation of the appellant, and was entirely without consideration. This case is controlled by *Morris-Müller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912. That was a case very similar to this one, and speaking to

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Opinion Per MOUNT, J.

the point in this case, we there said, quoting from 2 Morse, Banks & Banking (4th ed.), § 586:

"Checks deposited and credited as cash do not become the property of the bank, so that it takes the risk upon itself even though the depositor has been allowed to check against the deposit before the paper is collected, and the depositor can recover the check or other paper, if it is still in the possession of the depositor [depository]. When a depositor deposits a check *on another bank*, without any special contract, the property remains in him, and the bank is his agent until it has notice that the correspondent bank has received the money and credited it. If the deposit is made and credited to cover an overdraft, or is drawn upon, the bank can hold the paper until the account is squared, but the property is in the customer. It is said that indorsement of the check to the bank, and credit on the books of the bank and on the pass-book, are evidence of a contract by which the bank shall become owner of the paper; but (1) banks always claim and *exercise the right of charging to the depositor all such checks returned unpaid, which is not consistent with the theory of an understanding that title passes absolutely.* (2) The practice of allowing depositors to check against such paper is reckoned by the ablest text-writers as a mere gratuitous privilege."

And further on in the same opinion, quoting from *Jefferson County Sav. Bank v. Hendrix*, 147 Ala. 670, 39 South. 295, 1 L. R. A. (N. S.) 246, 250, it was said:

"A bank which receives a check for collection and enters the face value of it as a deposit credit to its owner, becomes the agent of the owner to collect it. If the collection is made, the relation of depositor and banker is consummated. If the collection is not made, the bank's right to charge off the deposit arises."

This is clearly the law of the question, and is conclusive of this case. The evidence is clear to the effect that the respondent bank credited the appellant's account with the sum of \$1,500 as an accommodation to him merely before the collection had been made. The collection, through no fault of the bank, was never made.

It is urged by the appellant that the bank counseled Mr. Wheeler to stop payment. But the evidence shows that what the officers of the bank did was to advise Mr. Wheeler that if he desired to do so he could have the payment of the check stopped by wire. There was no collusion or fraud on the part of the bank. It was simply advising its customer as it had a right to do. It did not profit by the transaction in the slightest degree; it had no intention to do so.

The judgment of the lower court is clearly right under the facts and under the law, and is therefore affirmed.

Crow, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11298. Department Two. January 24, 1914.]

B. L. BARKLEY, *Appellant*, v. JOHN B. KERFOOT *et al.*,
Respondents.¹

GARNISHMENT—LIABILITY OF GARNISHEE—CONTINGENT OR UNMATURED DEBTS—RENTS TO FALL DUE. Where rent under a written lease has been paid to a judgment debtor for the current month in advance, the tenant cannot be held as a garnishee for installments of rent falling due after service of the garnishee process, under Rem. & Bal. Code, § 693, providing that a garnishee may be held if indebted to the principal defendant and such indebtedness has not matured and is not yet due and payable, the same to be paid into court when due; since this only covers indebtedness existing at the time of the garnishment, and a covenant to pay future installments of rent is too uncertain and contingent to be a present absolute indebtedness within the meaning of the statute.

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered January 17, 1913, discharging a garnishee, after a hearing before the court. Affirmed.

Charles W. Johnson, for appellant.

Gerard Ryzek, for respondents.

¹Reported in 137 Pac. 1046.

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Opinion Per MORRIS, J.

MORRIS, J.—Appellant, having obtained a judgment against Kerfoot, garnisheed respondent Pinckney, who was a tenant of Kerfoot's under a written lease with rent payable monthly in advance. The rent for the current month having been paid at the time of the issuance and service of the garnishment, the garnishee was discharged, and Barkley appeals, contending that the garnishee should be held under the writ for future installments of rent to become due under the lease.

We cannot so hold. The general rule is that a creditor can obtain no greater relief against a garnishee than exists in favor of the debtor. It follows that, if there is no present indebtedness from the garnishee to the debtor, there is nothing upon which the writ can operate, except in so far as some statutory provision would establish a contrary rule. *Eureka Sandstone Co. v. Pierce County*, 8 Wash. 226, 35 Pac. 1081; *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675, 43 Am. St. 849; *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238.

Appellant contends we have such a provision in Rem. & Bal. Code, § 693 (P. C. 81 § 503) providing that "if it shall appear from the trial hereinafter provided for, that the garnishee is indebted to the principal defendant in any sum, but that such indebtedness has not matured and is not due and payable, the court shall make an order requiring the garnishee to pay such sum into court when the same becomes due." This provision plainly covers cases where the indebtedness has been created and exists at the time of the garnishment, but the time of payment has been extended to some future time or, as the courts sometimes put it, *debitum in praesenti, solvendum in futuro*. The covenant to pay rent at a stated future time creates no existing legal demand for the rent nor present indebtedness until the stipulated time has arrived. Such a covenant creates not an absolute, but a contingent liability, as causes may arise which may destroy the liability.

"The rent may *never* become due. The lessee may quit the premises with the consent of the lessor; or he may assign over his term with such consent, so as to discharge himself from rent; (b) or he may be evicted by a title paramount to that of his lessor; in either of which cases he will be discharged from the operation of his covenants." *Wood v. Partridge*, 11 Mass. 488.

It therefore seems to us quite clear that the covenant to pay future installments of rent, as they become due and fixed under a lease, is too uncertain and contingent to be regarded as an absolute, present, but not matured indebtedness, within the meaning of our statute; and the great weight of authority supports this rule. *Haffey v. Miller*, 6 Gratt. (Va.) 454; *Thorp v. Preston*, 42 Mich. 511, 4 N. W. 227; *Ordway Bros. & Co. v. Remington*, 12 R. I. 319, 34 Am. Rep. 646; *Buxbaum & Co. v. Dunham*, 51 Ill. App. 240.

Appellant cites us to *Sallaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, where it was held that a husband's contingent liability upon a lease upon which no rent was due at the time, was an "existing equity," within Rem. & Bal. Code, § 8766 (P. C. 95 § 47), providing that gifts or conveyances of community property between husband and wife are valid except as to existing equities in favor of creditors. "Existing equities," as there treated, embrace both existing and contingent liabilities, and the opinion makes a clear distinction between existing debts and existing equities. The case before us presents no question of "existing equities" under the cited statute, and the case is in no wise applicable to any question here involved.

The judgment is affirmed.

Crow, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

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Statement of Case.

[No. 11304. Department Two. January 24, 1914.]

C. H. STEWART *et al.*, Respondents, v. G. A. PRESTON *et al.*,
Appellants.¹

PRINCIPAL AND AGENT—FRAUD—LIABILITY OF AGENT. Where an agent misrepresents the price he had paid for land thereby inducing his principal to pay an advanced price, the agent is liable to the principal for the difference in price.

BROKERS—FRAUD—EVIDENCE—ADMISSIBILITY. In an action to recover from plaintiff's agent in the purchase of land the difference between the price actually paid by the agent and that which he represented as the cost, it is admissible to prove the customary commissions for purchasing lands for clients, where the plaintiff had offered to pay for the services, and defendant answered that he owed him nothing as he was to get his "commission" from the other side.

FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT. A contract authorizing an agent to purchase real estate, is not within the provision of the statute of frauds, requiring a contract employing a broker to sell real estate for a commission to be in writing.

APPEAL—PRESERVATION OF GROUNDS—PLEADING—OFFSET. An offset or counterclaim will not be allowed on appeal where it was not pleaded below.

BROKERS—FRAUD—LIABILITY OF AGENT—DAMAGES—OFFSET. An agent in the purchase of land, who was guilty of fraud in misrepresenting to his principal the amount paid for land, cannot offset against the damages the reasonable amount of his commissions which he had waived.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 16, 1912, upon the verdict of a jury rendered in favor of the plaintiffs, in an action upon implied contract. Affirmed.

Tolman & King, for appellants.

Graves, Kizer & Graves, for respondents.

¹Reported in 137 Pac. 993.

MORRIS, J.—It was sought in this action to recover the sum of \$1,000, upon the ground that G. A. Preston, a real estate broker, while acting as an agent for respondents in the purchase of forty acres of land, falsely represented to them that he had purchased the land at \$100 per acre, which was the least sum for which the land could be obtained; that, relying upon the truth of these false representations, respondents purchased the land at \$100 per acre, and subsequently discovered that Preston had entered into a secret arrangement with the owner of the land whereby the land was actually sold at \$75 per acre, but the seller was induced by Preston to name the consideration in the deed as \$100 per acre in order to deceive and mislead respondents, paying the difference between the real consideration and the assumed one to Preston. Answering, appellants pleaded a general denial and affirmative defense, raising the statute of frauds by alleging that no written memorandum or agreement of employment had been entered into. The issues were submitted to a jury, verdict returned for respondents, and appeal taken from the judgment.

The first assignment of error suggests insufficiency of the evidence to sustain the verdict. All we care to say on this assignment is that the relation between the parties was purely a question of fact, and there is ample evidence to sustain the verdict so far as it establishes the agency and fiduciary character of the relation. The facts being established by the verdict, the law fixes the right of recovery, as, under all the authorities, a principal may recover from his agent money obtained from him through false and fraudulent representations upon which the principal acts to his loss. *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 878; *Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861; *Easterly v. Mills*, 54 Wash. 356, 108 Pac. 475, 28 L. R. A. (N. S.) 952.

Error is next urged in the admission of evidence as to the customary commission paid real estate men in purchasing

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lands for their clients. The record discloses that, on the day of the purchase, when Preston returned to respondents informing them that he had purchased the land and made a \$100 payment, they spoke to him about his commission, and "told him that we would be glad to pay him something for his trouble and asked him what he wanted. He said we owed him nothing; that he was to get his commission from the other side." It was competent, therefore, to admit evidence of the usual commission, as touching what was in the minds of the parties and understood, and intended to be understood, when respondents were informed that Preston was being paid a commission by the seller. Respondents had a right to assume that, when Preston spoke of his commission, he referred to the usual and customary commission paid real estate men for services of a like character. This evidence is clearly admissible on the issue of fraud.

The next assignment urges there was no agency because not evidenced by writing. This contention is disposed of by *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361; *Merriman v. Thompson*, 48 Wash. 500, 93 Pac. 1075, and *Orr v. Perky Inv. Co.*, 65 Wash. 281, 118 Pac. 19. In the *Peirce* case, it is said:

"The contract which the statute declares to be void unless in writing is one for the payment of a commission to the agent, but it does not say that the actual authority to sell or purchase must be in writing."

In the *Merriman* case, it is said:

"The fact that there was not in writing an employment of appellants as agents for respondents might have a bearing upon the question of their commission. But we do not think the lack thereof would justify appellants, after selling this property for \$2,500, in retaining the difference between that and \$2,000, which was the amount they represented to respondents as being the highest sum they could get for the property, and for which they had sold, or were about to sell, the same."

These authorities affirm the rule as declared in other states. In *Rathbun v. McLay*, 76 Conn. 308, 56 Atl. 511, in disposing of a like contention, it is said:

"To adopt the defendant's contention would be to hold the monstrous doctrine that an agent employed to do anything concerning land could with impunity be as dishonest as he pleased and cheat and defraud his principal to his heart's content, if it chanced that his agency was not evidenced in writing."

It is finally urged that the court charged the jury: "If you find for the plaintiff, your verdict will be for \$1,000 and interest from April 20, 1909." Appellants suggest under this assignment that, if the jury should find for plaintiffs upon the question of agency, Preston should be entitled to a commission, contending:

"To permit respondents to remain silent when appellant in effect notified them that he disclaimed any agency for them and declared openly and frankly that he was acting for the seller and receiving his commission from him, and then allow them to profit by their silence by mulcting appellant not only of his commission which he notified them he was to receive from the appellant, but to receive in addition even that which they admit to have been his reasonable commission on the sale, would reward them for remaining silent when it was their duty to speak and thereby permit them to take advantage of their own wrong."

There are two answers to this contention; (1) it was not pleaded; (2) it was not a defense. *Jameson v. Kempton*, 52 Wash. 106, 100 Pac. 186, where it is said, in disposing of a contention that, in this sort of action, the agent would be entitled to offset expenses incurred in making the purchase:

"The offset, if it be so taken, was not pleaded. Nor do we think it would have been a defense if it had been. One who undertakes to overreach another should not be allowed to offset his expenses against the actual damages sustained by his adversary."

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The authorities generally so hold (19 Cyc. 225; 4 Am. & Eng. Ency. Law [2d ed.], 971); based upon the sound rule that, when an agent is guilty of fraud in executing the command of his principal, his right to compensation is lost.

Finding no error, the judgment is affirmed.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 11331. Department Two. January 24, 1914.]

C. M. BARBRE, *Respondent*, v. H. J. HIBSCHMAN *et al.*,
Appellants.¹

TRIAL—FINDINGS OF FACT—SUFFICIENCY. In an action upon a promissory note a finding of fact that the note was executed upon "a valuable consideration," is not objectionable as too general, on a request for specific findings; it not being necessary to set out in the findings what the consideration consisted of.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered April 9, 1913, upon findings in favor of the plaintiff, in an action on contract tried to the court. Affirmed.

H. J. Hibschman and *E. D. Reiter*, for appellants.

Smith & Mack, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover upon a promissory note. The defense pleaded was want of consideration for the note. The cause was tried to the court without a jury, and the court made findings of fact, one of which is as follows:

"That on November 5, 1910, the defendant H. J. Hibschman, for a valuable consideration, made, executed, and delivered to the plaintiff that certain promissory note, . . ."

A judgment was entered in favor of the plaintiff for the amount of the note, with interest. The defendants have appealed.

¹Reported in 137 Pac. 997.

The appellants argue but one point, to the effect that it was the duty of the court, upon request of the appellants, to make a specific finding of the facts constituting the consideration. It is argued that the finding "for a valuable consideration," is too general. If we concede that it was the duty of the court to make findings of fact, separately stated, it is too plain for argument that the finding in this case was sufficient. It was clearly not the duty of the court to set out in the findings what the consideration consisted of, whether money, property, services, or other things of that character. The finding that the consideration was a valuable one, is the ultimate fact, and was clearly sufficient.

No statement of facts is brought here, and it is therefore impossible for this court to determine whether the court erred in concluding that the consideration was a valuable one or not. There is no merit in the appeal. The judgment is therefore affirmed.

CROW, C. J., FULLERTON, MORRIS, and PARKER, JJ., concurred.

[No. 11341. Department Two. January 24, 1914.]

IDA B. CARD *et al.*, *Respondents*, v. WENATCHEE VALLEY
GAS & ELECTRIC COMPANY, *Appellant*.¹

ELECTRICITY—HIGH POWER TRANSMISSION LINE—NEGLIGENCE—QUESTION FOR JURY. The negligence of an electric light company in the maintenance of high power transmission lines is for the jury, where it appears that its uninsulated wires carrying 16,000 volts along a public highway was only 17 feet high, and extended two feet over the line of the highway onto the land of the deceased, who was killed while working under the line with a piece of iron pipe, which came in contact with the wire, and experts testified that such a wire should properly have been carried 45 feet above the ground.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such a case, the contributory negligence of the deceased was a question for the jury, where it appears that deceased was working upon an

¹Reported in 137 Pac. 1047.

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Opinion Per PARKER, J.

irrigation flume on his land, in which long iron pipes were used, that he was endeavoring to clear a piece of pipe of obstruction by holding it on end, when it accidentally came in contact with the wire, and the deceased did not know of the extremely dangerous character of the current carried by the wire.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered February 14, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Affirmed.

Reeves, Crollard & Reeves, for appellant.

Frank A. Steele and *Fred Kemp*, for respondents.

PARKER, J.—This action was prosecuted in the superior court for Chelan county, by the widow and minor child of James W. Card, to recover damages which they allege resulted to them from his death, caused by the defendant's negligent manner of maintaining its electric power transmission line. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiffs, from which the defendant has appealed. The contentions of counsel for appellant all go to their claim that the trial court erred in refusing to take the case from the jury and decide it in appellant's favor, as a matter of law; it being claimed that the evidence was insufficient to support any finding of negligence on the part of the appellant and, also, that the evidence conclusively showed that deceased met his death as the result of his own negligence. The facts are not seriously in dispute, the real contentions having to do with the question of what conclusions reasonable minds might draw from the facts as to the negligence of appellant and deceased.

James W. Card, at the time of his decease, owned and occupied, with his family, a small farm fronting upon a main traveled road, in Chelan county. Appellant maintained along this road a high power electric transmission line, consisting of poles supporting wires. The lower wire of this line was uninsulated, carried 16,500 volts, and was suspended from

the ends of cross-arms which projected over the line of the highway some two feet, so that it was directly over the land of deceased, and within seventeen feet of the ground. The land of deceased, like all other land in that neighborhood, was farmed by irrigation. It was customary for the farmers to carry water for irrigation on and across their land, to a considerable extent, in iron pipes as well as in open ditches and wooden flumes. The pipes varied in length from ten to twenty feet. Some of the iron pipes were made of light galvanized iron, and some of the heavier wrought iron.

On April 23, 1912, deceased was working upon his land near the highway, directly under appellant's transmission line, on one of his lateral flumes. He had a length of wrought iron pipe about twenty feet long and two and one-half inches in diameter, from the inside of which he was trying to remove a piece of wood. In his efforts to do so, he raised the pipe on end, and proceeded to raise and let it down upon the boards of the flume, with a view to jarring the wood out of it. The pipe then came in contact with the wire of appellant's transmission line, which was directly over his head. The pipe coming in contact with the wire, when raised off the ground while held by deceased in his hands, caused a ground connection of the electric current through his body, and he was thereby instantly killed.

Deceased had lived on this land for about three years, during which time appellant's transmission line had been there over his land. He knew of its presence, but there is no evidence that he knew of the extreme high power of the current, nor of its deadly effect to one coming in contact with it. There was evidence tending to show that he knew that a neighbor's boy had received a shock from throwing a long piece of sea kelp over the wire, while playing with the kelp as he would with a long whip, but apparently the shock then received by the boy was not serious. There was introduced testimony of experienced electrical engineers touching the proper height at which wires carrying powerful electric cur-

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rent should be suspended above the ground. This evidence was such as to fully warrant the jury in believing that, for a proper degree of safety, a transmission wire carrying 10,000 volts or more should be, in no event, less than 25 feet from the ground, and that the usual construction regarded proper by engineers would suspend a wire carrying 10,000 or more volts about 45 feet above the ground. Appellant had a franchise for the maintenance of its transmission line along this road, but had no right to suspend any of its wires over the land of deceased. It is conceded that the 16,500 volts carried by the wire which was suspended over respondents' land was highly dangerous, in fact, deadly in its effect, should any one come in contact with it either directly or through any medium which would cause the current to pass through the body of such person.

It is first argued that the evidence failed to show negligence on the part of appellant in the maintenance of its transmission line in the manner and location shown. It seems to us the degree of care required by the law from appellant in the handling of this highly dangerous agency must be considered in connection with the question of its negligence. The degree of care required of one in the handling of a more or less dangerous agency must be commensurate with the degree of danger involved; that is, the degree of care which must be exercised by one in handling an agency which is attended with but slight danger would require but a moderate degree of care; while, if the agency is attended with great danger, and especially if it is such as to destroy human life, the care must be of the highest degree. This view is well expressed by Mr. Croswell in his work, *The Law Relating to Electricity*, at § 234, as follows:

"The amount of care necessary varies with the danger which is incurred by negligence, for a prudent and reasonable man increases his care with the increase of danger. If but little danger is incurred, as, for instance, when the wires carry only a harmless electric current, such, for instance, as

the telegraph or telephone current, only ordinary care may be required. While if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result in serious accidents, and perhaps death, or if a harmless wire is in dangerous proximity to a high tension wire, a very high degree of care, indeed, the highest that human prudence is equal to, is necessary. This is particularly true of electric light and electric railway wires, which carry a high tension current often of great danger. The rule is thus stated in a case in Massachusetts. "The vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject-matter, the danger and force of the material under the defendant's charge."

This is in harmony with the views generally expressed in the decisions of the courts. *McLaughlin v. Louisville Elec. Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Metropolitan S. R. Co. v. Gilbert*, 70 Kan. 261, 78 Pac. 807; *Harter v. Colfax Elec. Light & Power Co.*, 124 Iowa 500, 100 N. W. 508; *Gilbert v. Duluth General Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. 430; *Phelan v. Louisville Elec. Light Co.*, 122 Ky. 476, 91 S. W. 703; see note to this decision in 6 L. R. A. (N. S.) 459.

Applying this rule of law to the facts we have noticed, we think there is little remaining to be said in support of the correctness of the action of the trial court in leaving the question of appellant's negligence to the jury. In the light of all the circumstances, we think it cannot be said that reasonable minds might not arrive at the conclusion that appellant was negligent in maintaining this high powered electric transmission line suspended within seventeen feet of the ground over the land of deceased.

Contention is made that the coming in contact with this wire by deceased in the manner shown was so extraordinary as not to require anticipation thereof by appellant. It may be that the particular manner of coming in contact with the wire would hardly be anticipated by appellant or its agents.

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That, however, it seems to us, is not the real test. As was said by Justice Siebecker, speaking for the supreme court of Wisconsin in *Wilbert v. Sheboygan Light, Power & R. Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. 931:

"To say that a condition is reasonably to be apprehended does not imply that the exact condition proven as to the erection of this tree wire was to have been expressly contemplated, but it implies that a dangerous condition, in the nature of this one, was likely to arise in connection with the conduct of appellant's business."

It seems to us it is not so much a question of what particular incident might occur to bring a person in contact with the wire; but whether a person, following his usual avocation where he has a right to be, might in any manner be brought in contact with the wire. It seems to us, in view of the deadly character of this powerful current, the high degree of care required of appellant in its maintenance, and the fact that it was suspended over the land of deceased at the height of seventeen feet, the jury might well conclude that appellant was bound to anticipate occurrences of the nature here involved. We are of the opinion that, under all the circumstances, the question of appellant's negligence was one for the jury, and could not be determined as a matter of law.

Our attention is called to the decisions of this court in *Graves v. Washington Water Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452, and *Mayhew v. Yakima Power Co.*, 72 Wash. 431, 130 Pac. 485, where the court held with the defendants on the question of their negligence as a matter of law. Those were extreme cases. In the *Graves* case, the plaintiff was not where he had a right to be; and besides, he was required to use extraordinary efforts to come in contact with the wire of the defendant. He was climbing up near the wire to secure a bird's nest. In the *Mayhew* case, the wire was suspended forty-five feet above the highway, and it was plain that no usual contemplated use of the highway

could possibly bring a person in contact with the wire. We think those cases are not controlling here.

It is finally argued that the deceased was negligent in allowing the pipe in his hands to come in contact with the wire. This, we think, was also a question for the jury and could not be determined as a matter of law, in view of the facts we have noticed; especially in view of the fact that deceased was where he had a right to be, engaged in his usual avocation, that appellant's wire was suspended over his land without right, and it not being shown that deceased had knowledge of the extremely dangerous character of the current carried on the wire.

The judgment is affirmed.

Crow, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 11842. Department Two. January 24, 1914.]

In re EIGHTH AVENUE NORTHWEST.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENT DISTRICTS—POWER TO FIX LIMITS. The legislature has power to provide, as in Rem. & Bal. Code, § 7790, that a city directing a public improvement may, in the initiatory ordinance, fix the limits of the assessment district, and that the same shall be conclusive on the commissioners; and the action of the city thereunder is legislative in character and beyond the control of the courts.

SAME—BENEFITS—ASSESSMENTS—LIMIT. The power of the city, under Rem. & Bal. Code, § 7790, to fix the limits of an assessment district does not authorize a levy of the whole cost of the improvement upon the district, regardless of benefits; in view of Const., art. 7, § 9, providing that the city may make local improvements by special assessment of property benefited, and clearly intending to limit the assessments to the amount of the benefits.

SAME — BENEFITS—ASSESSMENTS—APPORTIONMENT—RESTRICTIONS. Under Rem. & Bal. Code, § 7790, providing that no property shall be assessed more than it is actually benefited, and Id., § 7795, providing that if property has been assessed more or less than its proportionate share, the court shall determine the proper amount

¹Reported in 138 Pac. 10.

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and give judgment accordingly, property cannot be assessed in a greater amount than its relative benefit; hence, where the city has fixed an assessment district excluding lands that are benefited, the commissioners must take into consideration the benefit accruing thereto, and charge the lands within the district with only such proportions of the cost as corresponds to their proportion of the benefits, even if the assessment district was actually benefited to the full extent of the cost.

SAME—BENEFITS—ASSESSMENTS—APPORTIONMENT—METHOD. The assessment of lands within an assessment district for the total cost of an improvement, is arbitrary and upon a fundamentally wrong basis, where the commissioners testified that other land outside the district was also benefited, and would have been included in the assessment if it had been included in the district.

SAME—BENEFITS—ASSESSMENTS—EXCESSIVENESS—EVIDENCE—SUFFICIENCY. An assessment for benefits is excessive where lands within the assessment district were assessed in a sum sufficient to cover the entire cost of the improvement, and the commissioners testified that land outside the improvement district was also benefited and would have been assessed for part of the cost if it had been included in the district, and the only other witnesses testified that the property was assessed grossly in excess of the benefits, one of them testifying that it was not benefited at all.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 18, 1913, confirming an assessment roll, after a hearing on the merits. Reversed.

Buck, Benson & Knutson, for appellants.

James E. Bradford and *C. B. White*, for respondent.

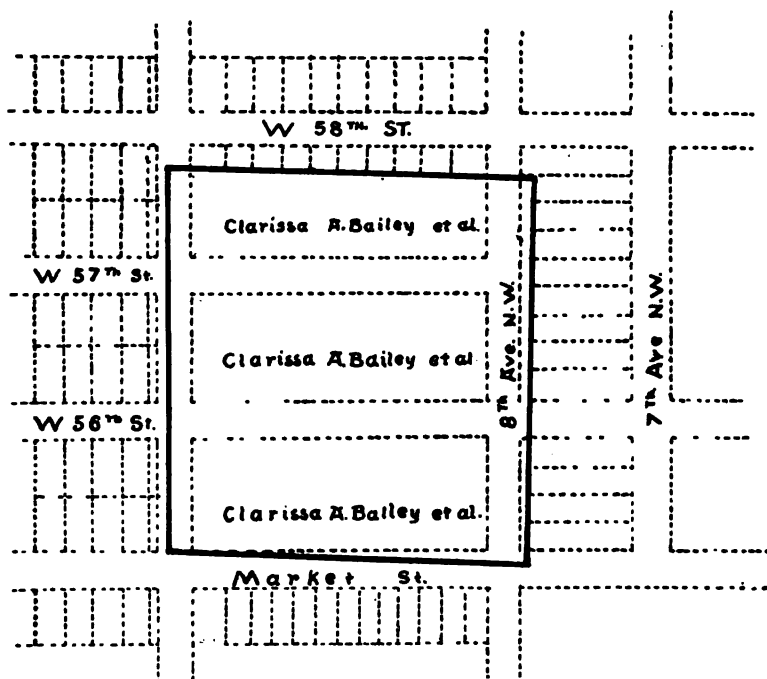
FULLERTON, J.—In 1882, the owners of certain lands, lying in sections 11, 12, and 13, in township 25, north, of range 8, east of the Willamette Meridian, in King county, Washington, caused the same to be platted into a number of 10-acre tracts, and to be recorded on the records of King county as the Farmdale Homestead Tracts. The appellants Bailey, in the year following, purchased one of such tracts, designated on the recorded plat as tract 38 of Farmdale Homesteads. For some reason, not shown in the record, the owners of the remaining tracts later became dissatisfied with the

manner in which the land was platted, and procured a vacation of the plat by the tribunal having jurisdiction in such matters. Still later, they caused the land to be replatted into lots, blocks, streets and alleys of the usual size as an addition to the then city of Ballard, now a part of the city of Seattle. By this replatting the lots, blocks and streets were made to abut upon all sides of the appellants' property.

In January, 1911, the city of Seattle, by ordinance, provided for the extension of the existing streets over the appellants' property. The ordinance directed that the cost of the proceeding should be "paid for by special assessment upon the property specially benefited lying within the limits of Tract No. thirty-eight (38), of the Farmdale Homestead Tracts, in section 12, township 25, north, range 3, East, W. M.;" and that, "any part of the cost of said improvement that is not finally assessed against the property specially benefited shall be paid from the general fund of the city of Seattle;" the tract of land described being the land owned by the appellants. The ordinance further provided that condemnation proceedings be begun by the corporation counsel of the city of Seattle to acquire the land necessary to be taken for the purposes, and to ascertain the compensation to be paid the owners for the lands so taken. Proceedings looking to that end were accordingly begun in the superior court of King county, and resulted in a judgment of condemnation of the land necessary to be taken for the streets, and an award to the owners by a jury of the sum of \$20,935.70. The land taken consisted of a strip 30 feet in width off the west side of the tract; a triangular shaped piece off the south side; a strip 60 feet wide extending through the east side; and two strips each 60 feet in width, extending east and west through the tract; the relative situation being shown in the sketch following. The continuous line shows the boundaries of the appellants' land, and the broken lines, the street extensions and the immediately surrounding territory.

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After judgment had been entered on the award of the jury, supplemental proceedings were begun in the superior court to procure an assessment upon the property benefited to pay the judgment, in accordance with the terms of the ordinance directing the improvement to be made. A petition was filed asking a reference of the matter to the eminent domain commissioners, which the court granted, and that body subsequently filed an assessment roll, in which they assessed against the remaining lands of the appellants as one body, without discrimination as to the condition in which it was left, the entire judgment, together with interest on the same amounting to \$1,047.66, and the costs of the city expended in the proceedings, consisting of the expenses of the corporation counsel, the city engineer, the county auditor, and the per diem and expenses of the eminent domain commissioners, totaling \$451.42, the whole making a grand total of \$22,452.38. Ex-

ceptions were taken to the assessment by the appellants and a hearing was had thereon, after which the court entered an order confirming the assessment roll, making the amount of the assessment therein a lien upon the remaining property of the appellants. As the amount levied to satisfy the judgment entered on the verdict of the jury, together with the interest thereon, will ultimately go to the appellants, the net results of the proceedings are that the city has taken for public use practically one-third of the appellants' property, has divided the remainder into five separate tracts, two of which are left in such shape as to be of no practical value, and has taxed to the appellants, making it a lien upon their remaining property, the entire cost of the proceedings, amounting to the sum of \$451.42.

The assignments of error made by the appellants can be reduced into two principal questions, namely: first, the validity of that part of the initiatory ordinance limiting the area to be assessed to pay the costs of the improvement, and second, the excessiveness of the levy as made. Noticing these questions, we shall first inquire as to the validity of the ordinance.

The right of a city in an ordinance initiating a public improvement to establish an assessment district which alone shall be assessed to pay the costs of the improvement has the sanction of legislative enactment. Rem. & Bal. Code, § 7790 (P. C. 171 § 75). The section of the statute expressly provides that the legislative body of a city directing a public improvement to be made "may in the ordinance initiating any such improvement establish an assessment district and said district when so established shall be deemed to include all the lands or other property especially benefited by the proposed improvement, and the limits of said district when so fixed shall be binding and conclusive on" the commissioners appointed to make the assessment. That such an enactment is within the power of the legislature is generally held by the courts. It was in effect so held by this court in the cases of *In re*

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Twelfth Avenue, 66 Wash. 97, 119 Pac. 5; *Spokane v. Curtis*, 66 Wash. 555, 120 Pac. 70; *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089; and in *In re Leary Avenue*, ante p. 399, 138 Pac. 8. In the first of these cases, the court said there was eminent authority for the position that the legislature not only had such power, but that the acts of a city acting thereunder were so far legislative in character as to be beyond the interference of the courts. To the authorities there cited, might have been added the case of *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682, and the same case where it was taken on writ of error to the Supreme Court of the United States, *Spencer v. Merchant*, 125 U. S. 345; and other cases from the same and other courts therein cited. There might have been added, also, perhaps, the case of *Norwood v. Baker*, 172 U. S. 269, although in this case it was stated that the "power of the legislature in these matters was not unlimited." But without inquiring into the extent of these limitations, we think that, under these authorities, it can be laid down as a general rule that a city, in an ordinance initiating a public improvement, when empowered expressly so to do by the legislature, may fix the boundaries of the district that shall be assessed to pay the costs of the improvements.

It is not to be understood, however, that the city can, even though directly authorized so to do by the legislature, levy the entire costs of the improvement on the district so fixed in the initiatory ordinance, regardless of the question of benefits. This, we think, is prohibited by that clause of the constitution authorizing the legislature to "vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited." True, there is here no direct prohibition against assessing property benefited by an improvement in excess of the benefits conferred thereby, but such is clearly its evident meaning. Const., art. 7, § 9.

The meaning of the constitutional provision is, however,

not very material to the present inquiry, since the legislature has not attempted to provide for an assessment in disregard of benefits. On the contrary, it has provided, in the very section of the statute empowering cities to establish assessment districts that "no property shall be assessed a greater amount than it will be actually benefited;" and in a subsequent section [Id., § 7795; P. C. 171 § 85] has provided the further limitation to the effect that, if it is made to appear to the court, on the hearing had on objections made to the assessment, that the property of the objector has been assessed "more or less than its proportionate share of the costs of the improvement," the court shall determine the amount in which the property ought to be assessed, and enter judgment accordingly. This latter rule requires that property benefited by a public improvement be assessed in no greater amount than its relative benefit. If, for example, two or more persons severally own tracts of land abutting upon a public improvement, each of which is equally benefited thereby, the city can, by the process of forming an assessment district, confine an assessment to pay the costs of the improvement to one or more of such tracts to the exemption of the others, but it cannot lawfully cause the entire cost to be assessed upon any number of such tracts less than the whole, even though the tracts assessed be benefited in a sum equal to the cost of the improvement. To do so would not only violate the express provisions of the statute above cited, but it would violate that general principle which underlies all assessments, the principle which requires assessments for the public benefit to be distributed with substantial equality over all property of like kind and similarly situated with reference to the subject-matter of the assessment.

Tested by these principles, is the property of the appellants in this instance assessed beyond its just proportion of the costs of the improvement? It seems to us that the record justifies the conclusion that it is palpably and grossly so. We are not unmindful of the rule, heretofore laid down by

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us as the controlling rule governing such matters, to the effect that the courts will not disturb the findings of the eminent domain commission unless such commission appears to have acted arbitrarily or has proceeded in making the assessment upon a fundamentally wrong basis; but we think the record shows that it so acted and proceeded in making this assessment. While the commissioners testified that, in their opinion, the remaining lands of the appellant were benefited by the opening of these streets in a sum equal to the value of the land taken, plus the costs incurred in the proceedings had to condemn the property, they also testified that lands other than the appellants' were also benefited, and that they would have distributed the assessment over such other lands but for the fact that the city in the ordinances initiating the proceedings had limited the area to be assessed to the appellants' remaining lands; apparently overlooking entirely a further clause in the initiatory ordinance to the effect that such part of the cost of the improvement as could not be lawfully assessed against the appellants' property should be paid from the general fund of the city. This was both arbitrary action, and proceeding upon a fundamentally wrong basis. The clause in the initiatory ordinance last cited authorized an assessment against the city generally for such proportion of the costs as accrued to the public benefit. In making the assessment, the commissioners should have taken this into consideration, as well as the proportionate share of the costs that should have been borne by the property benefited by the improvement not included in the assessment district, and assessed to the lands in the assessment district such part of the remaining costs as would not exceed the actual benefits conferred on such lands by reason of the improvement.

Again, the eminent domain commissioners are alone in the opinion that the actual benefit conferred on the appellants' property by the improvement equalled the sum assessed upon

it. The appellants' witnesses (the court limited the number they were permitted to call to three) all testified that the land was assessed greatly in excess of benefits. Indeed, one of them, who seems to have had a wide experience in such matters, and who was "a fair minded man" according to the endorsement given him by the trial judge from the bench, testified that the property was not benefited at all from the improvement. The others testified to comparative values, from which it can be deduced that the property was benefited to a certain extent by the improvement, but which, under a most liberal estimate, shows that it was assessed grossly in excess of the actual, and, of course, proportionate benefits. The witnesses gave the reasons for their conclusions at length, but it is unnecessary to repeat them here. It is sufficient to say that the record as a whole convinces us that the assessment must be materially reduced.

The problem of the amount of the reduction that ought properly to be made is not easy of solution; but, from the record as a whole, we feel that any assessment greater than one-fourth of that levied upon the lands by the commission would be excessive. The order of the court will be, therefore, that the judgment confirming the assessment roll be set aside as to these appellants, and the cause remanded to the lower court with instructions to reduce the assessment upon the appellants' property to the sum of \$5,613.10, and confirmed in that sum.

Crow, C. J., PARKER, MORRIS, and MOUNT, JJ., concur.

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[No. 11469. Department Two. January 24, 1914.]

O. D. TABOR, *Appellant*, v. THE CITY OF WALLA WALLA
et al., *Respondents*.¹

OFFICERS—RECALL—STATUTES—RETROACTIVE LAWS—REMEDIES. Since the amendment to the constitution of 1912, art. 1, §§ 33 and 34, and Laws 1913, p. 454 (3 Rem. & Bal. Code, § 4940-1 *et seq.*), enacted in pursuance thereof, relating to the recall of elective officers, expressly refers to officers of cities of the first class and are general laws on the subject, they supersede the recall provisions under the act of 1911.

STATUTES—TITLES AND SUBJECTS—SCOPE. The title to the act of 1911, Laws 1911, p. 504, submitting a constitutional amendment for the recall of elective officers, is not defective or misleading because broader than the act, in that the title refers to all public officers and to the election of their successors; while the proposed amendment in the body of the act excepts judges and makes no provision for the election of successors; the title being sufficient if it indicates to a person of ordinary intelligence the substance and scope of the act.

CONSTITUTIONAL LAW—AMENDMENTS—PROPOSAL—PASSAGE—REQUISITES—"ENTRY." Const., art. 23, § 1, requiring that amendments to the constitution proposed by the legislature shall be agreed to by two-thirds of the members elected to each of the two houses and "entered on their journals" does not require the copying of the entire proposed amendment in the journals of the Senate and House, but is complied with by a memorandum entry by reference to the proposal, using the language of the title of the act.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered July 17, 1913, dismissing a proceeding in mandamus, upon quashing the writ. Affirmed.

Brooks & Bartlett, for appellant.

John F. Watson (*Thos. H. Brents*, of counsel), for respondents.

MOUNT, J.—On May 31, 1913, a petition was filed with the city clerk of Walla Walla, demanding the recall of the mayor and street commissioner of that city. On June 9,

¹Reported in 137 Pac. 1040.

1913, the city clerk attached his certificate to the petition, reciting that the petition was insufficient for the reason that there were not enough signers thereto and for other reasons.

The laws of 1913 relating to the recall of elective officers went into effect on June 12, 1913. On June 19, 1913, additional petitions were filed with the city clerk, as amendments to the original petition. On June 28th, following, the city clerk certified that these petitions were insufficient under the act of 1913.

Thereafter, on July 12th, the plaintiff petitioned the superior court for Walla Walla county for a writ of mandamus to compel the calling of an election to recall the officers. The defendants filed a motion to quash this proceeding, for the reason that it had not been commenced within time, and that the petitions upon their face were insufficient, both in form and substance. This motion was sustained, and the proceedings were dismissed. This appeal was prosecuted from that order.

The appellant apparently concedes that the petitions were insufficient under the act of 1913, Laws 1913, ch. 146, p. 454; (3 Rem. & Bal. Code, § 4940-1 *et seq.*), but argues that this proceeding is controlled by the act of 1911; first, because the act of 1913 did not supersede the act of 1911; and second, because the constitutional amendment authorizing the recall of elective officers was void because of insufficiency of the title, and because it was not passed in the method provided by law. These questions were all decided adversely to the contention of the appellant in *Cudihee v. Phelps*, 76 Wash. 314, 136 Pac. 367, and in *State ex rel. Lynch v. Fairley*, 76 Wash. 332, 136 Pac. 374.

The judgment is therefore affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

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Opinion Per PARKER, J.

[No. 11480. Department Two. January 24, 1914.]

THOMAS M. WARNER, *Appellant*, v. EMPIRE REALTY
COMPANY *et al.*, *Respondents*.

EMPIRE REALTY COMPANY, *Respondent*, v. F. A. RATCLIFF
et al., *Respondents*.¹

CONTRACTS—EMPLOYMENT—SERVICES—LIABILITY OF THIRD PERSONS. A real estate salesman, employed by a brokerage company to work for it, and receiving as compensation a share of the commissions earned on his sales, cannot recover the amount of such commissions from clients of the brokerage company, without any garnishee process or recovery of judgment against his employer.

APPEAL—REVIEW—HARMLESS ERROR. In an action tried to the court, it is not prejudicial error to refuse an offer of proof which could in no event have changed the result upon the merits.

Appeal from a judgment of the superior court for King county, Humphries, J., entered May 28, 1913, upon findings in favor of the Empire Realty Company, in consolidated actions to recover a broker's commission, after a trial to the court. Affirmed.

Beechler & Batchelor, for appellant.

Wm. C. Keith, for respondents.

PARKER, J.—These actions, while commenced separately in the superior court for King county, were, by stipulation of all parties thereto, consolidated in that court. The rights of the plaintiff Warner are, in substance, those of an intervener in the action of Empire Realty Company against Ratcliff and wife. Warner seeks recovery from Ratcliff and wife of a commission upon an exchange of real estate, also sought to be recovered from Ratcliff and wife by Empire Realty Company. Warner also prays that the Empire Realty Company be adjudged to have no right to the claimed commission. A trial before the court without a jury resulted in a judgment in favor of Empire Realty Company, against Ratcliff and

¹Reported in 137 Pac. 1049.

wife for the sum of \$147, and also in the denial of the relief prayed for by Warner. The judgment against Ratcliff and wife was immediately satisfied by paying the amount thereof into court, which was, by order of the court, paid to Empire Realty Company. From this disposition of the cause, Warner has appealed to this court.

The controlling facts, we think, are not subject to serious controversy. In March, 1910, Empire Realty Company entered into a contract in writing with M. N. Knuppenburg, the provisions of which, so far as we need here notice them, were as follows:

"The said Empire Realty Company hereby employs the said second party as a real-estate salesman to take charge of the farm and acreage department of their said business, to work upon a commission basis, the said second party to devote his best efforts to the success of said business.

"It is hereby agreed between the parties hereto, that said second party shall receive as his compensation for said services, a certain share of the commissions earned by sales of acreage and farms, as hereinafter provided, to wit:." (Here follows a statement of commissions to be paid by Empire Realty Company to Knuppenburg for his services.)

In December, 1910, Empire Realty Company entered into a contract in writing with Ratcliff and wife by which it was to effect an exchange of certain lands of Ratcliff and wife, and receive a certain commission as compensation therefor. Thereafter, Knuppenburg, acting for Empire Realty Company, in pursuance of his employment contract above quoted from, effected the exchange of Ratcliff and wife's lands, resulting in the earning of the commission due from Ratcliff and wife in pursuance of their contract with Empire Realty Company. In December, 1911, Empire Realty Company commenced the first of these actions against Ratcliff and wife, to recover a claimed balance of \$285, due upon the commission. In January, 1912, Knuppenburg made an assignment to appellant Warner, reading as follows:

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"For value received, I hereby sell, transfer, set over and assign unto Thomas M. Warner, any and all accounts in favor of myself against F. A. Radcliffe and Nora A. Radcliffe, his wife."

In August, 1912, Warner commenced the second of these actions to recover from Ratcliff and wife the claimed balance of \$285 due upon the commission, and also prayed that the Empire Realty Company be decreed to have no interest in this balance.

Counsel for appellant evidently proceed upon the theory that a portion of the commission, equal to the agreed compensation due Knuppenburg measured by his employment contract with Empire Realty Company, constitutes an obligation which can be recovered upon by Knuppenburg, or appellant as his assignee, direct from Ratcliff and wife, and that Empire Realty Company had already received from Ratcliff and wife its portion of the commission. It seems to us that appellant's contentions rested upon this theory are fully answered by the contract of employment entered into by Knuppenburg with the Empire Realty Company, which renders it plain that he was employed by that company, and that his assignee, appellant, must look to it for the payment of his compensation. Appellant is not seeking from the Empire Realty Company, Knuppenburg's employer, a personal money judgment against it for services rendered by Knuppenburg, but seeks to pass over the head of Knuppenburg's employer, Empire Realty Company, and recover the compensation from its debtors, Ratcliff and wife; not through the usual garnishment proceedings, which would require that he first have judgment against the Empire Realty Company; but evidently upon the theory that Ratcliff and wife were indebted to appellant, as Knuppenburg's assignee, as well as Empire Realty Company for commission in making the land exchange. We are of the opinion that appellant was not entitled to judgment against Ratcliff and wife, since Ratcliff and wife owed him nothing, from which it necessarily follows

that he was not entitled to the money paid into court in satisfaction of the judgment rendered against Ratcliff and wife in favor of Empire Realty Company. Whether Knuppenburg or appellant, as his assignee, is entitled to a money judgment in any sum against Empire Realty Company on Knuppenburg's employment contract is a question that is not involved in this controversy, nor is the judgment rendered herein in anywise *res adjudicata* of that question.

It is complained that the court erroneously excluded certain evidence offered by counsel for appellant. A somewhat careful reading of the statement of facts leaves us in doubt as to the exact offer of proof made. We think, however, that no offer of proof was made tending to show that the employment contract between Empire Realty Company and Knuppenburg, from which we have quoted, was not entered into and was not in force at the time of the earning of the commission due from Ratcliff and wife upon their land exchange, nor was there any offer made tending to show that Knuppenburg, in the consummation of that exchange, was acting otherwise than under and in pursuance of that employment contract. The offers of evidence would, in no event, have changed these controlling facts. We are of the opinion that the offered proof could in no event have changed the result upon the merits, and therefore no prejudice resulted from the court's rulings thereon.

A number of other rulings of the court touching the pleadings and other matters of procedure are challenged. It is possible that a careful review of these rulings might disclose some technical errors, but they were so clearly without prejudice to the rights of appellant that we think they do not call for discussion.

The judgment is affirmed.

CROW, C. J., MOUNT, FULLERTON, and MORRIS, JJ., concur.

[No. 11648. *En Banc*. January 24, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Mountain
Timber Company, Plaintiff*, v. THE SUPERIOR COURT
FOR COWLITZ COUNTY *et al., Respondents*.¹

EMINENT DOMAIN—RIGHT OF STATE. The Federal constitution being a grant of power, and a state constitution a limitation of power, the right of eminent domain is not derived from the constitution, but is inherent in sovereignty, and apart from the constitutional prohibitions, need not be for public use.

EMINENT DOMAIN—TAKING PRIVATE PROPERTY—"PRIVATE WAYS OF NECESSITY." Const., art. 1, § 16, prohibiting the taking of private property for private use, except for "private ways of necessity," etc., does not use the term in its common law sense, so as to limit the exception to private ways of necessity appurtenant to some grant, but means "necessary private ways;" and it was within the constitutional powers of the legislature to define, by Laws, 1913, p. 412 (3 Rem. & Bal. Code, § 5857-1), a private way of necessity as including a logging road right of way necessary for the proper use and enjoyment of private timber lands, and to establish the procedure for condemning the same.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EMINENT DOMAIN—TAKING PRIVATE PROPERTY. The taking of private property for private use for the promotion of the general welfare, upon due hearing and the payment of consideration, is not incompatible with the Federal guarantee of due process of law.

Certiorari to review a judgment of the superior court for Cowlitz county, Back, J., entered October 17, 1913, dismissing a proceeding to condemn a right of way for a logging road, upon sustaining a demurrer to the petition. Reversed.

E. C. Strode, Imus & Gore, and *Coy Burnett*, for relator.
Miller, Crass & Wilkinson, for respondents.

Gose, J.—This is an application for a writ of certiorari to review the judgment of the superior court of Cowlitz county, denying to relator the right to condemn land for a right of way for a logging road. The relator seeks to condemn a

¹Reported in 137 Pac. 994.

right of way for a logging road over and across land owned by the respondents Wiberg, in order that it may convey its timber from lands owned by it to its sawmill. The petition discloses that there is no outlet for a part of its timber other than over the respondents' lands, and that it cannot secure the right of way except by condemnation. A general demurrer to the petition was sustained, and a judgment adverse to the relator was entered.

Section 16, art. 1 of our constitution provides:

"Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made."

Laws of 1913, page 412 (3 Rem. & Bal. Code, § 5857-1 *et seq.*), provide:

"Section 1. An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, . . . The term 'private way of necessity,' as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried."

Section 2 provides that the procedure and mode of compensation in such cases shall be the same as that provided for the condemnation of private property by railroad companies. The relator has brought itself within the provisions of the act by proper averments in its petition. The trial court sustained the demurrer because it thought the act un-

constitutional. The constitutionality of the act is the only question presented in the briefs or argued at the bar.

A recurrence to certain fundamental principles will be helpful in clearing the way for a correct solution of the question. One of these principles is that the Federal constitution is a grant of power. Another is that a state constitution is a limitation of power. Except as a state has surrendered to the Federal government a portion of its sovereignty or as it has limited its own power, it is wholly sovereign. It, therefore, follows that the power of eminent domain is not derived from the constitution, but exists independent of the constitution as an attribute of sovereignty. In short, it is a right which is inherent in sovereignty. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 78 Pac. 670. It follows, therefore, that in determining whether a legislative act is violative of the constitution of the state, we must look to that instrument not for the purpose of ascertaining whether the power to pass the particular law has been granted, but to see whether the power has been taken from the law makers. The general power to take private property for a private use, in the absence of constitutional restrictions, is thus stated by Mr. Lewis:

"Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare. . . . Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature, that is, a use in which the public participates, directly or indirectly, as in case of highways, railroads, public service plants and the like. It is sufficient that the use of the particular property for the purpose proposed, is necessary to enable individual proprietors to utilize and develop the natural resources of their land, as by reclaiming wet or arid tracts, improving a water power or working a mine. In such cases the public welfare is promoted by the increased prosperity which necessarily results from developing the natural resources of the country. Such exercises of the power of

eminent domain have been upheld by many courts, including the Supreme Court of the United States and, we think, must be regarded as legitimate exercises of the power, in the absence of constitutional restrictions which limit the taking to public uses." Lewis, *Eminent Domain* (8d ed.), § 1.

"The correct view is that the power of eminent domain is not a reserved, but an inherent right, a right which pertains to sovereignty as a necessary, constant and inextinguishable attribute." *Id.*, § 3.

See, also, 15 Cyc. 557; *State v. County Commissioners*, 83 Ala. 304, 3 South. 761.

The respondents contend that the term "private ways of necessity" must be given its common law meaning. The theory of the common law is that, where land is sold that has no outlet, the vendor, by implication of law, grants one over the parcel of which he retains ownership. It passes as an appurtenance to the parcel expressly conveyed, so as to enable the grantee to have access to it. In short, a private way of necessity at common law rests in grant and passes with the parcel expressly granted. The consideration paid for the parcel expressly granted extends to and embraces the appurtenance. The common law right is wholly foreign to the power to take property by the exercise of eminent domain. The one proceeds from contract; the other from a proceeding *in invitum*. It follows that, if the argument is sound and the legislature is without power to define the term "private ways of necessity," and establish the procedure for the taking, the constitutional provision is without meaning. As we said in an earlier case, there were eminent lawyers in the convention which framed our constitution, and they will be presumed to have known the common law meaning of the term, and to have intended that it should be defined and construed so as to give it vitality and so as to give it a meaning in consonance with the subject of eminent domain. It seems to the writer that, in the beginning, it should have been construed to mean necessary private ways. But in the case of *Long v. Billings*, 7 Wash. 267, 34 Pac. 936, it was held that the term

should be given its common law meaning until the legislature had defined it and established a procedure for making the right usable. In *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820, the principal question considered by the court was whether the contemplated use was a "public use," within the meaning of the constitution, and whether that phrase was synonymous with "public benefits." At page 496, the court adverts to the fact that our constitution makes it a judicial question whether a given use is in fact a public use. At pages 504 and 505, the court recognizes that the legislature untrammelled by constitutional restraint may, in the exercise of its sovereignty, take private property for private use. In that case, as in *Long v. Billings*, the court adopted the common law definition of the phrase. In *Sultan R. & Timber Co. v. Great Northern R. Co.*, 58 Wash. 604, 109 Pac. 320, 1020, in referring to the *Healy Lumber Co.* case, we said:

"In this connection, however, the appellant makes the contention that the respondent had no legal right to cross its tracks with a private logging road, and that in consequence it gave up nothing when it surrendered such claim of right. The case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820, is cited as sustaining this contention, but we cannot think the case conclusive of the question. It is true we did there hold that a logging company performing no public function was without power to condemn a way for a logging road, notwithstanding the legislature had purported to confer on it that power, but the question of the right of a logging company to condemn for such a way when the way was one of necessity was neither presented nor decided. The constitution (art. 1, sec. 16), grants the right to take private property for private ways of necessity, and it was open to the respondent to claim that the conditions then existing presented a sufficient cause for the exercise of the right. It is not necessary now that we inquire how well founded was this claim. It is enough that the parties themselves treated it as a right and contracted with reference to it."

Schulenburg v. Johnstone, 64 Wash. 202, 116 Pac. 848, 35 L. R. A. (N. S.) 991, was decided before the passage of the act of 1913, and follows the *Healy Lumber Co.* case. We think the legislature acted within its constitutional powers in defining a private way of necessity and establishing the procedure for making the right available. As defined, it is promotive of the public welfare, in that it prevents a private individual from bottling up a portion of the resources of the state. In *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241, in construing a constitutional provision identical in language with ours, the court said:

"It is apparent from the foregoing provisions that our constitution is, in certain particulars touching the right to take private property for private use, exceptional; and for certain enumerated uses changes the accepted rule that the use to which private property may be condemned must be public."

In *Jones v. Venable*, 120 Ga. 1, 47 S. E. 549, private parties engaged in the business of quarrying granite were permitted to condemn a right of way for a private railroad across the land of another so as to connect the quarry with a public service railroad. The court conceded that the enterprise was purely private. The Georgia constitution provided: "In cases of necessity private ways may be granted upon just compensation being first paid by the applicant." In *Sultan R. & Timber Co. v. Great Northern R. Co.*, *supra*, it is said that "the constitution, art. 1, § 16, *grants* the right to take private property for private ways of necessity." This statement is not legally accurate. The constitution does not *grant* the right. It excepts the right from the general prohibition against taking private property for private use. In *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68, we said: "The power to condemn land is an attribute of sovereignty. It is a power recognized, not granted, by the constitution." The word "necessary" means

reasonably necessary. *Samish River Boom Co. v. Union Boom Co.*, *supra*.

The respondents have cited *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199, and kindred cases from this court. In these cases the question before the court was whether the contemplated use was a public one. The cases have no reference to private ways of necessity. The respondents have also cited a line of cases construing constitutions which provide that no private property shall be taken for public use without just compensation. These words have uniformly been construed as equivalent to a constitutional declaration that private property without the consent of the owner shall be taken only for public use, and then only upon just compensation. It is apparent that such cases throw no light upon the question at bar. Broad language may be found in construing such constitutional provisions, but what is said by the courts must be read in the light of the particular constitutional provision under consideration. The respondents have cited *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 418, 70 L. R. A. 497. The constitution of Maryland provides:

"The General Assembly shall enact no law authorizing private property to be taken for public use, without just compensation, as agreed upon between parties, or awarded by a jury, being first paid or tendered, to the party entitled to such compensation."

In construing this provision the court quoted from *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537, 559, as follows:

"This [constitutional provision] is but declaratory of the previously existing universal law, which forbids the arbitrary and compulsory appropriation of any man's property to the mere private use of another, even though compensation be tendered."

This language, if accepted literally, means that the state, in the absence of constitutional restraint, is not wholly sov-

ereign. It is, we believe, the universally accepted view that all property is derived from society. 1 Cooley's Blackstone (4th ed.), p. 484, and foot notes. In *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, this court quoting from *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709, said, "The right of property is a legal right and not a natural right, and it must be measured always by reference to the rights of others and of the public." If this be true, then there can be no universal law which, in the absence of constitutional restrictions, forbids a state from providing for the condemnation of private ways of necessity in furtherance of the development of its material resources. To accept the broad language used in the Maryland case would be to hold that our constitution is itself unconstitutional.

The taking of private property for private use for the promotion of the general welfare, upon due notice and hearing and the payment of compensation, is not incompatible with due process of law, as guaranteed by the Federal constitution. *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9.

The judgment is reversed, with directions to overrule the demurrer.

ALL CONCUR.

[No. 11053. *En Banc*. January 28, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Augustus S. Peabody, Trustee, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Respondents*.¹

EMINENT DOMAIN—BY CITIES—POWER—PROPERTY SUBJECT—STREET RAILWAYS AND FRANCHISES—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 8005, authorizing, in somewhat general terms, a city to construct and operate a municipally owned system of street railways, and in the exercise of the power, to condemn and purchase cable, electric and other railways within the limits of the city, is sufficiently broad to permit the condemnation of a street railway already devoted to the public use, as well as its franchises, although no specific mention is made of railways in active operation nor of the franchises of the railways mentioned.

SAME—PROPERTY SUBJECT—STREET RAILWAYS—LOCATION—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 8005, authorizing a city to condemn street railways within such city, authorizes the condemnation of such portions of a street railway as lie within the city limits, although the road is partly within and partly without the city and is operated as a unit, and may damage property outside the city; since it is a necessary incident of the powers granted, and since the city must make compensation for all property damaged whether within or without the city.

SAME—STREET RAILWAYS—COMPENSATION—"IN MONEY"—STATUTES—CONSTRUCTION. An ordinance providing for condemnation of parts of a street railway within the city for a municipal street railway system, and directing the board of public works to arrange and grant common user rights over the acquired track for that portion of the railway not condemned and outside of the city limits, in case the remaining portion is in suitable condition for operation after the condemned part is taken, does not violate Const., art. 1, § 16, requiring "full compensation" for property taken to be first "made in money;" especially where the common user rights to be granted are further shown not to have been intended as compensation by the proviso in the ordinance requiring such rights to be granted upon the basis and in the manner prescribed in the charter, which requires the railway company to pay for the common user rights granted by contributing a fair proportion of the cost and maintenance expense.

¹Reported in 138 Pac. 277.

SAME. In condemnation for a municipal street railway, under such act and ordinance, the city is restricted in the granting of common user rights to the charter requirement of contribution for a fair proportion of the cost and maintenance expense; and hence could not release to the railway company common user rights over the acquired tracks, for the purpose of having the jury consider such rights in making up their award of damages.

SAME—STREET RAILWAYS—PROCEEDINGS—APPRAISAL—TENDER—SUFFICIENCY. In condemnation for a municipal street railway, it cannot be claimed that the prerequisite appraisal of the property of the street railway company sought to be condemned, and the city's offer to purchase, was in form only and not in good faith, where the railway company made no objection to the appraisal at the time of its submission, and submitted no corrected appraisal, as it was authorized to do by the ordinance.

MUNICIPAL CORPORATIONS—ORDINANCE—PUBLICATION. Seattle city charter, art. 4, § 17, providing that all ordinances shall be published at least once in the city official newspaper within three days after the same becomes a law, is directory merely, and publication within a reasonable time (six days), is a sufficient compliance.

SAME—ORDINANCES—SUBMISSION TO ELECTORS—BALLOTS. The submission of an ordinance providing for a municipal street railway for ratification by the electors is not invalidated by the fact that the proposition was not printed upon the general election ballots, as required at general elections, but upon separate ballots, where, although the election was held at the time of the general election and by the general election officers, it was in fact a specially called election, and the ballots would have been valid if the election had been held apart from the general election; especially where no legal voter was denied the right to freely express his will.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—DUE PROCESS—EQUAL PROTECTION OF LAWS. An act authorizing the condemnation of a street railway and its franchises (Rem. & Bal. Code, § 8005), does not impair the obligation of the contract, or deprive a person of property without due process, or deny the equal protection of the laws.

EMINENT DOMAIN—PROCEEDINGS—PARTIES—NECESSARY DEFENDANTS. In a proceeding to condemn, for a municipally owned street railway system, the tracks and property of a railroad company which is in the actual possession of receivers, the receivers are necessary parties defendant whose presence is essential to a valid order of condemnation.

Certiorari to review a judgment of the superior court for King county, Mitchell, J., entered February 24, 1918,

adjudging a public use and ordering an assessment of damages, in condemnation proceedings. Reversed.

Donworth & Todd, for relator, contended, among other things, that there is no statute authorizing a city to take or damage a railway line outside of the city limits. Rem. & Bal. Code, § 8005. Statutes conferring the power of eminent domain are construed with extreme strictness and if there is any doubt of the existence of the power, it will be denied. Lewis, Eminent Domain (3d ed.), §§ 387, 388; 6 Am. & Eng. Ency. Law (2d ed.), p. 522; *Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248; *Seattle v. Fidelity Trust Co.*, 22 Wash. 154, 60 Pac. 133; *State ex rel. Attorney General v. Superior Court*, 36 Wash. 381, 78 Pac. 1011; *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855; *North Coast R. Co. v. Aumiller*, 61 Wash. 271, 112 Pac. 384; *State ex rel. Wauconda Inv. Co. v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913 E. 1076. Wherever an entire piece of property exists, whether a tract of land or any other kind of property, the appropriation of a part constitutes a taking which affects the entire property. 2 Lewis, Eminent Domain (3d ed.), § 686; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903. Wherever by statute certain classes of property or structures are excepted from the operation of eminent domain laws, whatever is reasonably necessary for the enjoyment of the excepted property is also deemed to be excepted. *McCann v. Trustees of Mt. Gilead Cemetery*, 166 Ind. 573, 77 N. E. 1090. A municipal corporation cannot usually exercise its powers beyond its own limits, and if in any case it has authority to do so, it must be derived from some statute which expressly or impliedly permits it. *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217; *Newberry v. Fox*, 37 Minn. 141, 33 N. W. 333, 5 Am. St. 830. Requiring the owners of the existing railway to accept certain running rights over the tracks to be operated by the city within the city limits as partial or total compensation

for damages to that part of the railway not to be acquired by the city, is in direct conflict with the provisions of the state constitution, which requires that compensation for all property taken or damaged shall be determined by a jury and made in money. 2 Lewis, *Eminent Domain* (3d ed.), §§ 682, 756; *In re Smith's Petition*, 9 Wash. 85, 37 Pac. 311, 494; *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. 339; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332. The submission to the voters of the unauthorized requirement of the acceptance of the running rights as part of the compensation, vitiates the whole proceeding. *Metcalf v. Seattle*, 1 Wash. 297, 29 Pac. 1010; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *Tacoma Light & Water Co. v. Tacoma*, 13 Wash. 115, 42 Pac. 533; *Aylmore v. Seattle*, 48 Wash. 42, 92 Pac. 932. The statutes of this state do not authorize cities to appropriate by condemnation railways which are going concerns operating under franchises and thus already devoted to a public use, and thereby terminate the operation thereof by the railway companies. Rem. & Bal. Code, § 8005 (P. C. 77 § 1073). General authority in a statute to condemn does not authorize the condemnation of property already devoted to a public use, but such authority must either be conferred in express terms or must be necessarily implied from the language used. 2 Lewis, *Eminent Domain* (2d ed.), §§ 276, 440; Thompson, *Corporations*, § 5619; *Matter of City of Buffalo*, 68 N. Y. 167; *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491, 69 Pac. 1107, 92 Am. St. 907; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144; *Suburban Rapid-Transit Co. v. New York*, 128 N. Y. 510, 28 N. E. 525; *Cincin-*

nati, W. & M. R. Co. v. City of Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. 285; *City of Valparaiso v. Chicago & G. T. R.*, 123 Ind. 467, 24 N. E. 249; *Little Nestucca Toll-Road Co. v. Tillamook County*, 31 Ore. 1, 48 Pac. 465, 65 Am. St. 802; *Van Reipen v. Jersey City*, 58 N. J. L. 262, 33 Atl. 740; *In re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270. The constitution discriminates between property and franchises. Const., art. 12, § 10. The legislature in enacting the statute, carefully omitted the word "franchises." Rem. & Bal. Code, § 7768 (P. C. 171 § 31). The rule of *ejusdem generis* requires that the word "property" should be given a meaning akin or related to that of "land." *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217. This proceeding is not maintainable for the reason that the entire property, franchises and assets of the railway company are in *custodia legis*, and were so situated at the commencement of this proceeding, being in the hands of receivers appointed by and acting for the superior court of King county. *In re Tyler*, 149 U. S. 164; *Burleigh v. Chehalis County*, 75 Fed. 873; *Chicago City R. Co. v. People ex rel. Hall*, 116 Ill. App. 633, 640; *Pacific R. Co. v. Wade*, 91 Cal. 449, 27 Pac. 768, 25 Am. St. 201, 13 L. R. A. 754; *American Loan & Trust Co. v. Central Vermont R. Co.*, 86 Fed. 390; *Tink v. Rundle*, 10 Beavan 318; 5 Thompson, Corporations, § 6379; High, Receivers (3d ed.), §§ 139, 140, 256; 1 High, Injunctions (4th ed.), § 73.

James E. Bradford and *Howard M. Findley*, for respondents, contended, *inter alia*, that the city has the power to condemn private property *either within or without* its corporate limits for public and corporate uses. *State ex rel. Kent Lumber Co. v. Superior Court*, 35 Wash. 303, 77 Pac. 382; *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215. The purpose of this act was to confer additional power upon cities and enable them to acquire all existing public utilities. *Aylmore v. Seattle*, 48 Wash. 42, 92 Pac. 932; *Tacoma v. Nisqually Power*

Co., 57 Wash. 420, 107 Pac. 199. The city has at least implied power to damage that part of the line outside of the city. *United States v. Gettysburg Elec. R. Co.*, 160 U. S. 668; *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217; *In re Jackson Street*, 47 Wash. 243, 91 Pac. 970; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903. The provision with reference to running rights as embodied in the petition and ordinances pursuant to which this condemnation proceeding was instituted, is in the nature of a stipulation limiting the estate taken and permitting a joint use of the right of way by both the city and the company. 15 Cyc. 717, 718; *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663; *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515; *Oregon R. & Nav. Co. v. Owley*, 3 Wash. Ter. 38, 13 Pac. 186; *Tyler v. Hudson*, 147 Mass. 609, 18 N. E. 582; *St. Louis K. & N. W. R. Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940; *Tacoma Eastern R. Co. v. Smithgall*, 58 Wash. 445, 108 Pac. 1091. The provision with reference to running rights is not such an essential element of the "system or plan" as must be first adopted by the city council and then submitted to the voters and thereby prevent the petitioner from disregarding the same and acquiring all the rights of the railway company within the city. *Tulloch v. Seattle*, 69 Wash. 178, 124 Pac. 481; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077. The act authorizes the condemnation of railways already devoted to a public use. *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199; *Brady v. Atlantic City*, 53 N. J. Eq. 440, 32 Atl. 271. The receiver was not a necessary party under the statute. Rem. & Bal. Code, § 7771 (P. C. 171 § 37); *Garaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68; *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853; *Carton v. Seattle*, 66 Wash. 447, 120 Pac. 111; *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109. The failure to serve an interested party does not invalidate the pro-

ceedings as to those properly served. 23 Am. & Eng. Ency. Law (2d ed.), p. 1044; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; *Owen v. St. Paul, M. & M. R. Co.*, 12 Wash. 313, 41 Pac. 44; *Mercantile Trust Co. v. Pittsburgh & W. R. Co.*, 29 Fed. 732.

FULLERTON, J.—This is a writ of review, sued out of this court by the relator, Augustus S. Peabody, to review an order of the superior court of King county, entered in a proceeding brought by the city of Seattle to condemn, for municipal purposes, certain of the railway property of the Seattle, Renton & Southern Railway Company. The relator questions the power of the city to condemn the property sought to be acquired, as well as the procedure pursued in its attempted acquisition; and to an understanding of the questions involved, a somewhat extended statement of the matters shown in the record is necessary.

The grant of power on which the city relies to maintain the proceedings is found in the legislative act of March 17, 1909, commonly known as the public utilities act (Laws of 1909, ch. 150, p. 580; Rem. & Bal. Code, §§ 8005-8010; P. C. 77 §§ 1073-1083), the applicable part thereof reading as follows:

"That any incorporated city or town within the state be, and is hereby, authorized . . . to construct, condemn and purchase, purchase, acquire, add to, maintain, operate or lease cable, electric and other railways within the limits of such city or town for the transportation of freight and passengers above, upon or underneath the ground, with full authority to regulate and control the use and operation thereof, and to fix, alter, regulate and control the fares and rates to be charged thereon; . . ."

Another section of the act provides that, whenever the city council, or other corporate authorities of any such city or town, shall deem it advisable that the city or town of which they are officers shall acquire the public utility above mentioned, they shall provide therefor by ordinance, which

ordinance shall specify and adopt the system or plan proposed, and declare the estimated cost thereof, as near as may be, and the same shall be submitted for ratification or rejection to the qualified voters of the city at a general or special election. It is also provided that, if a general indebtedness is to be incurred in the acquisition of the utility so provided for, the terms of such indebtedness shall likewise be submitted to the qualified voters at such election for ratification or rejection. Elsewhere the statute provides a procedure for the acquiring of property necessary to be taken in order to construct and put in operation the desired utility. It is provided that, if it is necessary to condemn land or other property for such purpose, the city shall provide therefor by ordinance, and shall cause a petition to be filed in the superior court of the county in which such city is situated, in the name of the city, praying that the just compensation to be made for the property to be taken or damaged for the purposes specified in the ordinance be ascertained by a jury, or by the court in case a jury be waived. It is also provided that,

"Such petition shall contain a copy of said ordinance, certified by the clerk under the corporate seal, a reasonably accurate description of the lots, parcels of land and property which shall be taken or damaged, and the names of the owners and occupants thereof, and of persons having any interest therein, so far as known, to the officer filing the petition or appearing from the records in the office of the county auditor." Rem. & Bal. Code, § 7771 (P. C. 171 § 87).

On January 9, 1911, the city council of the city of Seattle passed an ordinance adopting a system and plan for a municipally owned street railway. Generally described, the line projected began at the southerly boundary of the city, and ran from thence in a northwesterly direction to the business section of the city, and from thence continued in a northwesterly direction to the northerly boundary thereof. From its beginning point to the business section of the city, it follows the route of the railway owned and operated by the

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Seattle, Renton & Southern Railway Company. The ordinance specifically provides:

"Wherever any portion of the routes hereinbefore designated is found to be occupied by any existing electric railway, private owned right-of-way, track or tracks, or any of the facilities or appurtenances used in the operation of the same, and such right-of-way, tracks, facilities and appurtenances, or any of them, are in the judgment of the Board of Public Works suitable and necessary for use as part of the electric railway system or plan hereinbefore specified and adopted, the same shall be appraised at a fair and just valuation by the Board of Public Works, which shall employ expert assistance in such appraisal as may be necessary. A similar, but separate appraisal shall likewise be made of any cars or other equipment which may then be in use for the operation of any such existing electric railway, and of any sites and structures used for housing, repairing and maintaining said equipment, so far as any such equipment, sites, or structures shall in the judgment of the Board of Public Works be suitable and necessary for use as part of the electric railway system or plan hereinbefore specified and adopted. The result of such appraisal shall thereupon be certified to the owner of any such existing electrical railway property for his or its consideration and acceptance of said appraisal, as the amount to be paid to and accepted by said owner for conveyance of said property, or any portion thereof, before the City of Seattle shall take possession of the same. Failure by said owner to accept said appraisal within sixty (60) days, or within said period to present a counter proposal or corrected appraisal which shall upon reconsideration be deemed satisfactory by the Board of Public Works, shall be considered as a rejection of such appraisal and a refusal to enter into any agreement for voluntary purchase and sale of such property. In the event of such failure, rejection or refusal by said owner, the City Council may authorize the necessary proceedings to condemn and purchase, as provided by law, any or all of said property and appurtenances, together with any rights which may exist to maintain and operate the same. These provisions for purchase, or for condemnation and purchase, of any existing electric railway property, shall not be deemed to limit the power, right or authority of the City of Seattle

to construct a new track or tracks, with all necessary facilities and appurtenances for the operation of the same as part of the electric railway system or plan hereinbefore specified and adopted, upon or along any portion of the streets which may be found occupied by any existing electric railway, if the same be not deemed by the Board of Public Works suitable or necessary for use as part of the city electric railway system or plan, or if the property cannot be purchased at the appraised or agreed valuation, or if for any reason the City Council shall not authorize the condemnation and purchase of said property. And in the event of such decision to construct a new track or tracks in any street where existing tracks are found, but not acquired or running rights thereon secured by agreement, the Board of Public Works shall prescribe the location of said new track or tracks in any such street.

"If the main portion of any existing electric railway shall be acquired and made part of the city electric railway system or plan, and there be any remaining portion of said existing electric railway in suitable condition for operating but unacquired because not included in the city system or plan, and which would be rendered less valuable, or inoperative if the same be separated from the main portion of said existing electric railway, then in any such case the Board of Public Works is authorized to arrange and grant running rights for cars to or from any such unacquired portion of such existing electric railway over any necessary city tracks; such running rights for cars to be arranged and agreed, as near as may be, upon the basis and in the manner prescribed in the city charter for use of 'common-user' tracks.

"Wherever any portion of any street hereinbefore designated for the city electric railway system or plan is found to be occupied by the track or tracks of any existing electric railway, which said track or tracks have been constructed and are being maintained under a franchise which prescribes 'common-user' provisions as to any such track or tracks, the Board of Public Works may in behalf of the City of Seattle arrange for the acquirement of running rights for city cars over any such track or tracks under the provisions for 'common-user' set forth in such franchise or fixed in the city charter; provided, however, that this shall not be held to

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limit the power, right or authority of the City of Seattle to purchase, or to condemn and purchase, the whole of any such track or tracks, and any rights thereto appertaining." Seattle Ordinance No. 26,069.

The estimated cost of the construction of the railway, as recited in the ordinance, was \$800,000. To raise this sum, a general indebtedness of the city was proposed; the sum to be evidenced by bonds running twenty years, and to bear interest not to exceed four and one-half per centum per annum, payable annually; such bonds to be issued, sold, and the principal and interest thereof to be paid, in conformity with the provisions of the laws of the state of Washington authorizing the issuance of bonds.

The ordinance further provided for the submission of the system and plan proposed to the voters of the city for ratification or rejection at a special election to be held in the city on March 7, 1911, the same being a day on which a general city election was to be held. It was also provided that a condensed statement of the scheme "shall be printed upon the official ballot prepared as provided by law, and that the officers of election serving at the general city election on that day should serve as officers for the special election." The proposition was submitted on the day appointed, and received the requisite number of votes necessary to adopt the same. The proposition, however, was not printed on the general election ballot in use on that day; but was printed on a separate ballot, and when returned by the voter was deposited in a separate ballot box from that in use for the deposit of the general election ballots, although the ballots were counted and the return of the count made by the general election officers.

Following the ratification of the scheme proposed by the electors of the city, the city caused its board of public works to make an appraisal of the Seattle, Renton & Southern Railway Company's property, in so far as it lay within the limits of the city, and to certify the same to the

railway company for its consideration and acceptance as the amount to be paid it for such property. The appraisement as made and tendered, however, did not place any value upon the company's franchises, but included, in separate items, its track, machinery and buildings, rolling stock and real estate, the whole being valued at \$386,053.69. The railway company, by its president, replied to the tender without referring to the fact of its completeness or incompleteness, simply saying that it did not desire to sell the properties as set forth in the tender, but offered the city, in case it desired operating rights over its railway tracks, to take up and consider with the city's board of public works the amount of compensation to be paid for such rights.

The city thereupon passed another ordinance, No. 28,134, directing a condemnation of the railway company's property, in so far as it lay within the city limits. The ordinance recites the passage of the first ordinance above cited, adopting a plan and scheme for a municipally owned street railway, its submission to and ratification by the electors of the city, and its inability to agree with the owner of the railway system for its purchase. Section 1 of the ordinance describes the property sought to be obtained. The description covers the railway company's property lying within the city limits of the city of Seattle, and includes its line of tracks, its roadbed, turnouts, wyes, switches and connections; all of its poles, wires, and overhead equipments, together with all fixtures and appurtenances used in the supply, distribution and application of electric power; all of its lands lying within the city limits; its car barn and other structures, and all fixtures, machinery, tools and appliances therein contained; all of its rolling stock; and all,

"such franchises or operating rights, if any, privileges, easements and other private rights, or interests therein, if any, save as set forth in section 2 hereof, as may be possessed by said Seattle, Renton & Southern Railway Company, its successors and assigns, or any other person or cor-

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poration, for the maintenance and operation of the above described line in the existing limits of the city of Seattle, together with all such other franchises or operating rights or interests therein, if any, as may be owned by the Seattle, Renton & Southern Railway Company, its successors and assigns, and persons claiming thereunder within the limits of the city of Seattle, whether tracks be laid upon the same or not."

Section 2 of the ordinance reads as follows:

"That the Board of Public Works shall arrange and grant to the Seattle, Renton & Southern Railway Company, its successors and assigns, for that remaining portion of its existing electric railway outside of the city limits, running rights for cars to or from such unacquired portion of said existing electric railway, over and upon the system hereby condemned; such running rights for cars to be arranged and granted as near as may be upon the basis and in the manner and subject to the limitations prescribed in the City Charter of the City of Seattle for use of 'common-user' tracks."

The fourth section of the ordinance authorizes and directs the corporation counsel of the city to begin and prosecute all such actions as may be necessary to "condemn, appropriate, take and damage" the property necessary to be taken and damaged to construct the railway described therein.

The common user clause of the charter of the city of Seattle relating to the granting of franchises for the construction and operation of street railways within the city, referred to in section 2 of the ordinance, reads as follows:

"Common user trackage facilities and appurtenances shall be required in all franchises on any route, to be made available for other franchise grantees and for the city itself at any time during the grant, upon contribution of a fair proportion of the cost and maintenance expense, not including any franchise valuation allowance, and if the compensation for such common user cannot be agreed voluntarily between respective grantees, or the city itself, it shall be fixed by arbitration, each party appointing one arbitrator, and if the two fail to agree, they shall appoint a third, and the result

of such arbitration shall be binding upon the parties." Seattle Charter, art. 4, § 19.

The Seattle, Renton & Southern Railway Company is a corporation organized and existing under the laws of the state of Washington. It owns a railway line extending from near the center of the business section of the city of Seattle southeasterly to the town of Renton, a distance of some thirteen miles, having a length of nine miles wholly within the city limits of the city of Seattle. In the operation of its road, no distinction is made between the parts within and without the city, but all is operated as a single unit. The corporation is a common carrier of freight and passengers, and has a gross annual income from its business of some two hundred and fifty thousand dollars. Of this sum, about 85 per centum is derived from business arising within the city of Seattle. The headquarters of the company are also located within the city, on a tract of land, known as tract 30, Morningside acre tracts, on which are located its only car barn and repair shops, which contain all of the tools and repair outfit owned by it.

The company operates its railway lines within the city of Seattle under some ten different franchises, granted it and its predecessors in interest from time to time by the city, all of which were put into the record by the corporation counsel of the city. These franchises authorize the railway company to construct, maintain and operate its line of railway over the route upon which it is now being maintained and operated; the same being principally upon the streets of the city for the first six miles of the way, measuring from the business center of the city; and for the last three miles, upon a privately acquired right of way, although it appears that the city, subsequent to the acquisition by the company of this portion of its right of way, extended one of its streets thereover. The railway has been in operation as a common carrier for freight and passengers for over twenty years.

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In June, 1908, the railway company executed a mortgage, or deed of trust, to August S. Peabody, as trustee (and another who afterwards declined to act) of all of its property, to secure an issue of bonds in the maximum sum of \$1,000,000, of which bonds to the amount of \$825,000 were issued and sold in the ordinary course of business. These bonds are still outstanding and unpaid.

In April, 1912, in an action brought in the superior court of King county by William E. Crawford against the Seattle, Renton & Southern Railway company and others, in which receivers were appointed over the property and effects of the corporation and since such appointment, the property of the company has been in the possession of, and operated by, the receivers.

The proceeding now in review was begun on April 30, 1912. The city originally made parties thereto the relator, Peabody, and certain persons and corporations thought to have an interest in the company's property. The corporation itself was not made a party to the proceeding originally, but was later joined as such by the order of the court. The receivers were not made parties originally, nor were they afterwards joined. The relator, Peabody, alone appeared and contested the proceedings. At the beginning of the trial, he called the attention of the court and counsel for the city to the fact that receivers appointed by the court in another proceeding were in possession of, and operating, the property at the time the present proceeding was instituted, and insisted there was a defect of parties defendant. The city, however, elected to proceed without making the receivers parties to the proceedings, and the court permitted them so to do. The trial then proceeded, and on its conclusion, the court entered the following order:

"This cause coming on to be heard on the 19th day of February, 1913, upon the application of the petitioner, The City of Seattle, for an adjudication of public use, the petitioner and the respondent Augustus S. Peabody, Trustee,

being represented in court by their respective counsel and oral and written proof having been submitted to the court, and the court having heard and considered said testimony, and having listened to the argument of counsel and being fully advised in the premises, now therefore, it is

"ORDERED, ADJUDGED AND DECREED that the contemplated use for which the private property referred to, and more particularly described in the petition herein, is sought to be taken or damaged under the laws of the State of Washington, is a public use, to wit: the condemnation, appropriation, taking and damaging of all the private railway system now operated and owned by the Seattle, Renton & Southern Railway Company within the City of Seattle, together with its railroad, rolling stock and equipment, fixtures, land, property rights and franchises, the whole being required for the purpose of or in connection with the acquisition, maintenance and operation of a municipal street railway system in the city of Seattle.

"IT IS FURTHER ORDERED that the motion of said Augustus S. Peabody, Trustee, for a dismissal of this cause on the pleadings and the proofs submitted at said hearing and his objections to the maintenance of this proceeding, be and the same are hereby overruled.

"IT IS FURTHER ORDERED that this cause be set for hearing before the court and a jury on the question of the amount of the just compensation to be ascertained herein on the 19th day of March 1913, at 9:30 o'clock A. M., unless some later day is hereafter fixed by the Court.

"To this order and the whole thereof said Augustus S. Peabody, Trustee, excepts, and said exception is allowed.

"Done in open court this 24th day of February, 1913."

It is the relator's first contention that the act of the legislature under which the city is proceeding is not sufficiently broad to permit the condemnation and purchase by the city, for a municipally owned street railway, of a street railway owned by a corporation which is already devoting the property to a public use. Attention is called to the rule of law that a statute conferring general authority to condemn does not authorize such condemnation, but that such authority must be either expressly conferred, or must be necessarily

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implied from the language used in the grant of power. Attention is also called to the fact that the statute does not mention the franchises of the existing railway, and it is argued with much force, from the general rule of law and from the fact of this omission, that under the statute of this state there is neither an express nor an implied grant of such power.

The material part of the statute thought to confer the power, we have set forth in the statement. It has seemed to us that it is sufficiently broad for the purposes intended. It confers upon the city the authority to construct and operate a municipally owned system of street railways. In the exercise of the power it may "condemn and purchase . . . cable, electric and other railways within the limits of such city . . . with full authority to regulate and control the use and operation thereof; . . ." True the terms of the statute are somewhat general. There is no specific mention of railways in active operation, nor are the franchises of such railways mentioned. But the terms used, being general, are sufficiently broad to include such railways and their franchises, and since there is no specific exception of railways of the class mentioned, or of the franchises under which they operate, we think it must follow that the statute was intended to include them. A grant of power by the legislative branch of the government, if it is to meet the exigency of all cases, must of necessity be general in its terms. To particularize is to limit its scope. And here, since the power is given to condemn and purchase cable, electric and other railways generally, we think it must be held rather to include all that the terms imply than that specific exceptions were intended. The power to condemn a railway includes the power to condemn all that pertain to the railway—its operating rights, its franchises, as well as any other property pertaining thereto.

We shall not review the authorities cited by the relator to

maintain his position. It seems to us that the general question is concluded by our own case of *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199. That was a proceeding instituted by the city of Tacoma to condemn and appropriate certain lands and water rights, lying along the Nisqually river, for the purpose of generating electric power for the use of the city. It was objected that the property sought to be condemned was already devoted to a similar public use by its then owners, and that the statute did not authorize the condemnation of property so employed. The statute authorizing the condemnation is similar in its terms to the statute before us, and the court, after quoting its language, used the following language:

"It would seem that, in the employment of such language, it was the intention of the legislature to expressly grant the power of condemnation of property devoted to a public use. Otherwise there could be no meaning to the words 'condemn and purchase,' 'works, plants and facilities.' The legislature, having in mind, in many of our cities, works, plants and facilities were in use furnishing such cities with heat, power, water, and lights, sought to confer upon cities the right to acquire such plants by either purchase or condemnation. Certainly if it is not an express grant, it is at least a necessary implication. Otherwise the language could be given no force or effect whatever. The whole tenor of the act is a manifest intention to confer upon cities the right to acquire all existing public utilities, either by condemnation or purchase, or to construct their own plants for such purposes."

We are aware that the relator argues that this question was not before the court, and that its expression of opinion thereon is no more than dictum. It is true that, in the course of the opinion, the court did say that the property sought to be condemned was not then devoted to a public use, and that there was no assurance that it ever would be so devoted, except as such assurance might be gathered from the various resolutions of the owner's board of trustees. But the court also said that it did not wish to rest the decision

on that ground; that there was a broader and more comprehensive ground on which the decision could rest, and it then proceeded to discuss and decide the claim of want of power. The case is, therefore, direct authority on the question here involved.

It is further contended, in this connection, that the act in question, conceding it to authorize the condemnation of a railway within the limits of the city of Seattle, is inapplicable to the conditions here presented, and cannot be invoked to condemn the road of the Seattle, Renton & Southern Railway Company. The argument is that the act confines the right of condemnation to railways which are within the limits of the city; that the road here in question is a unit, and operated as such; that it lies partly within and partly without the city; and that, to take from it the portion lying within the city limits, must necessarily damage, if it will not wholly destroy, the remaining portion of the road; and since the statute in express terms limits the right of a city to condemn such railways only as lie within the limits of the city, there is no authority to damage or destroy railways without its limits.

But, in our opinion, this construction of the statute is not warranted. As we view the statute, it authorizes the condemnation and purchase by the city of all street railways constructed within its limits; and if this be true, the power is not to be taken away because such condemnation and purchase may incidentally damage property without its limits. It is a general rule that an express grant of power carries with it all incidental powers necessary to render operative such express grant, and the rule, we think, is applicable to the case before us. If the power is not found in the express words of the grant, it arises therefrom by necessary implication. The city, must, of course, compensate the owner of the property for all the property taken, and for such damages as may be done to its property not taken, whether within or without the city limits; but clearly it would be

contrary to the purport and intent of the statute to deny to the city the right to exercise the power conferred because, by so doing, it may damage property outside of its limits.

By a reference to the ordinance submitting the scheme for a municipally owned railway to the electors of the city of Seattle, it will be observed that it contains a clause to the effect that, if the main portion of any existing electric railway shall be acquired and made a part of the city electric railway system or plan, and there be any remaining portion of such existing electric railway in suitable condition for operating but unacquired because not included in the city system or plan, and which would be rendered less valuable or inoperative if the same be separated from the main portion of such existing electric railway, then in such case the board of public works of the city is authorized to arrange and grant running rights for cars to or from any such unacquired portion of such existing electric railway over any necessary city tracks; such running rights for cars to be arranged and agreed, as near as may be, upon the basis and in the manner prescribed in the city charter for the use of common user tracks. The provision of the city charter relating to common user rights we have heretofore quoted. Section 1 of the ordinance directing the condemnation to be made, it will be observed, provides for the condemnation of "all such franchises or operating rights if any, privileges, easements, and other private rights or interests therein, if any, save as set forth in section 2 hereof" of the railways necessary to be taken for the establishment of the proposed municipal railway. Section 2 of the ordinance we have also quoted. In substance, the section provides that the board of public works of the city shall arrange and grant to the Seattle, Renton & Southern Railway Company "for that remaining portion of its existing electric railway outside the city limits," running rights over the portion condemned; such rights to be granted as "near as may be upon the basis and in the manner and subject to the limitations" prescribed

in the provision of the ordinance before quoted directing the submission of the scheme to the electors of the city.

The appellant contends that the city is, by this proceeding, attempting to compensate the railway company in part for the property proposed to be taken and damaged in the condemnation proceedings by granting it certain property rights, whether it desires to accept them or not, in violation of art. 1, § 16, of the state constitution, which provides that "full compensation" for property so taken shall be "made in money." But it has seemed to us that this is hardly a permissible interpretation of the ordinances, or of the procedure of the city thereunder. By an examination of the ordinance ratified by the electors, which must measure the city's authority for its subsequent proceedings, it will be observed that the city is authorized to arrange and grant running rights for cars over the acquired tracks only in case there may be a remaining portion of an existing railway in suitable condition for operation after the part condemned is taken away, and that these rights are to be granted as near as may be upon the basis and in the manner prescribed in the city charter providing for common user rights. It will be observed, further, that the charter provision is made operative only as between holders of franchises granted to private individuals or companies, and does not have relation to municipally owned railways; in other words, the charter provision requires that private holders of franchises for street railways shall grant to each other common user rights, it does not require that the city, in the case that it shall construct and operate a municipally owned street railway, shall grant to other street railway companies common user rights over its tracks. It would seem, therefore, that this proviso, as adopted by the electors, could have no greater effect than to place the Seattle, Renton & Southern Railway Company on the same plane with reference to the city's proposed municipally owned railway that it now occupies with reference to privately owned street railways operated under

franchises granted by the city. The electors have simply required the city to do what has been heretofore required of other street railway companies. That it could not have been intended as part compensation for the property and property rights taken and damaged, is further evidenced by the fact that the railway company whose property is proposed to be taken is required to pay for the privilege granted—it must still make “contribution of a fair proportion of the cost and maintenance expense.” Nor does it seem to us that the condemnation ordinance does more. Section 2 of that ordinance, when read in the light of the proviso of the ordinance adopted by the electors, merely names the branch of the city government which shall have authority to put the scheme into effect. This is the interpretation the city, at the time of the condemnation proceedings now in review, placed upon the ordinances. At or prior to the time of that hearing, the city had not, either through its board of public works or otherwise, made any tender to the railway company of running rights. It sought to condemn, and obtained a judgment condemning, “all of the private railway system now operated and owned by the Seattle, Renton & Southern Railway Company within the city of Seattle, together with its railroad, rolling stock and equipment, fixtures, land, property rights and franchises, the whole being required for the purpose of or in connection with the acquisition, maintenance and operation of a municipal street railway system in the city of Seattle.” For the property thus sought to be taken, and for the damages the taking may cause to the remaining property of the owner, it must pay in money before it takes it. It can do neither more nor less by the terms of the ordinances under which it is proceeding, nor by the express provisions of the state constitution. A private corporation having only its individual interests to consider may change its schemes from time to time as suits its convenience, but the city officers have no such authority with reference to the public business. They must pursue powers granted them

in accordance with the grant, and any substantial departure therefrom renders these proceedings a nullity. They must pursue the powers here conferred in substantial accord with their terms, and, as we have said, they have thus far so pursued them. There is, therefore, on the face of the record, no ground for the contention that the city proposes to make compensation for the property taken other than in money.

We are aware that counsel for the city take a position in their brief with reference to the construction of these ordinances somewhat different from that which we have here taken. They argue that the city's board of public works may, at the time of the trial, release to the owners of the railway condemned running rights over the acquired railway tracks, and that the jury may consider such rights in making up their verdict as to the amount of damages that will be suffered by such owners by reason of the taking. But, as we have shown, the board of public works have no authority to tender anything not authorized by the ordinances under which the city is proceeding, and that these do no more than authorize the board to contract on behalf of the city for running rights in accordance with the terms of the city charter, which provides for running rights only upon a compensation being paid for the privilege. If such be not the meaning of the ordinances then they are clearly inimical to the constitutional provision prohibiting the making of compensation for property taken other than in money. It is true this court has said that a party condemning may take less than the whole of a given property, and that the compensation need be made for the part taken only, but such is not the present case. Here the city, by its ordinances providing for the condemnation, and by the judgment of condemnation entered, provided for the taking of the entire property of the railway company within the city limits. The whole of the property is taken, not a part merely, and the part taken fixes the measure of the compensation. The amount of such compensation cannot be lessened by a tender of something

the railway may not want, and which it must pay for if accepted.

It is next argued that the scheme or plan proposed by the ordinance for taking the property sought to be condemned has not been substantially followed by the city officers. It will be remembered that the ordinance submitted to the electors contains a condition to the effect that, before condemnation proceedings shall be begun for the acquisition of an existing railway, an appraisal shall be made of its property by the board of public works of the city and the appraisal submitted to the owners of such property for acceptance or rejection. The argument is that this provision of the ordinance was complied with in form only, and not in good faith, or in accordance with its purpose and intent. But this objection, we think, does not require an extended answer. The representative of the railway company to whom the tender was submitted made no objection to the appraisal on this ground at the time of its submission to him. On the contrary, he answered saying that the property was not for sale, and made a counter proposition to the effect that the company was willing to enter into negotiations with the city looking to an agreement by which the city could acquire running rights over the company's tracks. The ordinance, it will be remembered, provided that the company might submit a counter proposal, or a corrected appraisal, to the city's board of public works, if it so desired; and clearly, after having submitted a counter proposal, and failing to submit a corrected appraisal, it cannot now complain of the good faith of the city.

The Seattle charter (art. 4, § 17) provides that "all ordinances . . . shall be published at least once in the city official newspaper within three days after the same shall become a law." The ordinance authorizing the condemnation proceedings relied upon in this instance was passed and became a law on October 13, 1911, and was published for the first time on October 19, 1911. It is contended that the

ordinance is void because of this failure to comply strictly with the terms of the city charter. But the requirements of the city charter with reference to the publication of ordinances is directory, in so far as the time in which they must be published is concerned. The purpose of requiring that they be published is to inform the general public of their contents, and it is a sufficient compliance with the requirement that they be published within a reasonable time.

It is further contended that the ordinance providing the scheme and plan for the proposed municipally owned railway was not legally submitted to the electors of the city. This contention is based on the fact that the condensed statement of the proposition submitted was not printed upon the election ballot used at the general election held upon that day, but was printed on a separate ballot, as if at a special election called for that purpose alone. Citations are made to the statutes relating to the form of ballots required at a general election, and it is argued that these statutes require that all questions authorized by law to be submitted at an election must be printed upon a single ballot, and also that these provisions of the statute required that the proposition submitted in this instance be printed upon the general ballot in use upon that day. Had the proposition been so printed, we have no doubt that the form of the submission would have been valid, but we think it by no means follows that the form adopted in the present instance was invalid. This was a special election called for the purpose of submitting this particular question. True, it was called at the time of the general election, and the general election officers were selected as officers of the special election; but it was, nevertheless, a special election, and the laws relating to the form of the ballot at a general election are not mandatory. Ballots in the form here used would have been valid without question had the proposition been submitted at a special election held apart from the general election, and we think the form valid here. There is no claim that any legal

voter was by this form of proceeding denied the right to freely express his will upon the question submitted. The statutes governing the proceeding are not clearly defined. The rule of procedure must be gathered from their general trend, rather than from specific enactments. In such cases,

"Courts are, and of right ought to be, reluctant to defeat the fair expression of the popular will manifested by the voters at an election the express and only object of which is to ascertain the popular will, and such expression will be upheld and made effective unless the law which defeats it is so plain and unequivocal that it is susceptible of but one construction." *Fox v. Seattle*, 43 Wash. 74, 86 Pac. 379, 117 Am. St. 1037.

It may be well to add that the validity of this election was upheld by us in *Tulloch v. Seattle*, 69 Wash. 178, 124 Pac. 481, where the validity of the bonds issued pursuant to this election was upheld, although the precise question here suggested was not there specifically suggested or passed upon.

It is next objected that the ordinances are in violation of those clauses in the Federal constitution which prohibit states from passing laws impairing the obligation of contracts, or depriving persons of life, liberty and property without due process of law, and denying to persons within its jurisdiction the full protection of the laws. It is urged that the franchises of the railway company whose property is sought to be condemned are contracts, and that it is not due process of law, and is depriving the company of the equal protection of the laws to compensate for property taken other than in money. But we have no doubt that it is within the power of the legislature to provide for the condemnation of railroad franchises granted by the state; and as we have said, the city has not, as yet, in so far as this record discloses, sought to compensate the appellant for the property proposed to be taken other than in money.

Finally, it is objected that there is a defect of parties to the proceedings. This objection we think is well taken. At the time the proceedings were commenced the property of

the railroad company was in the hands of receivers and no leave to sue them was obtained, nor were they made parties to the proceedings. The statute relating to parties specifically requires that the owners and occupants of property sought to be condemned shall be made parties, and clearly these receivers were occupants of this property at the time these proceedings were begun. Their presence was necessary, therefore, to a valid order of condemnation, and the proceedings are fatally defective without them. We have not overlooked the respondents' argument that a proceeding in condemnation is a proceeding *in rem*, and that this court has held that persons having liens upon the property are not necessary parties unless the statute makes them so. But these receivers are not mere lien holders. They were in actual possession of the property, were occupants thereof, and by statute are necessary parties. The cases of *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68; and *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853, cited by the respondents do not sustain a contrary view. In the first case, it was inferentially, if not expressly, held that parties holding interests required by the statute to be made parties to the proceedings were necessary parties without whom condemnation could not be had; and in the second case, the parties then thought necessary were mere lien holders, whom the statute did not direct should be made parties.

The conclusion reached on the last point discussed requires a reversal of the judgment. It is not required, however, that a dismissal of the proceeding be directed, as the city may be able to obtain leave of the court which appointed the receivers to make them parties to the proceedings. The judgment of this court will be, therefore, that the order of condemnation under review be reversed, and the proceedings remanded to the lower court with instructions to grant to the city a reasonable time within which to make parties to the proceedings the receivers in possession and occupancy

of the property, and such other persons as it may deem necessary, and proceed with a further hearing in due course.

Crow, C. J., MAIN, ELLIS, and PARKER, JJ., concur.

[No. 11353. Department One. January 29, 1914.]

LIZZIE CROFT, *Respondent*, v. L. FLOYD CROFT, *Appellant*.¹

~~DIVORCE—ALIMONY—ENFORCEMENT—CONTEMPT—EVIDENCE—ADMISSIBILITY.~~ In contempt proceedings to enforce the payment of alimony, it is not error to exclude evidence as to property conveyed to the wife prior to the entry of the decree of divorce, since that was presumably considered at that time.

~~APPEAL—RECORD—FINDINGS—WAIVER.~~ In contempt proceedings to enforce alimony, the failure to make findings cannot be assigned as error, in the absence of request therefor or any objection or exceptions to the failure to make them.

~~DIVORCE—ALIMONY—CONTEMPT—ACCRUING PAYMENTS.~~ In contempt proceedings to enforce alimony, objection cannot be made to the judgment in that it punishes for violation of distinct orders and the failure to pay money not due when the order of arrest was made, where the accumulations all relate to one modified order in aid of which the arrest was made, and defendant had full notice of the due and accruing payments, and answered to the merits without objection; the jurisdiction of the court being a continuing one.

~~SAME—ALIMONY—CONTEMPT—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF.~~ A conviction for contempt in failing to pay \$986 support money, the amount of accumulated payments at \$20 per month, awarded in a decree of divorce, is sustained where it appears that the defendant had never made any payments, that he was an able-bodied man, earning \$3.50 a day at the time of the hearing, had remarried, and had received \$500 from his father at one time during the period, and his credit was such that he had been able to run in debt over \$1,000; the burden of proof being upon him to show his inability to pay.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 25, 1913, upon a conviction of contempt, after a hearing on the merits before the court. Affirmed.

¹Reported in 138 Pac. 6.

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Opinion Per ELLIS, J.

Gates & Emery, for appellant.*Tucker & Hyland*, for respondent.

ELLIS, J.—This is an appeal from an order of the superior court declaring the defendant in contempt, and imposing an imprisonment in the county jail for thirty days, unless he sooner pay the sum of \$986. The parties to this action were formerly husband and wife, and were divorced by decree of the superior court on June 17, 1908, which decree awarded to the plaintiff, the wife, the custody of the two minor children, then aged respectively seven and eight years. On September 2, 1908, the decree was modified on petition of the plaintiff so as to require the defendant to pay to her, for the support of these children, \$20 each month. On October 4, 1909, \$146 being due from the defendant under the decree so modified, the court on proceedings had upon the plaintiff's motion, ordered the defendant to pay this sum and \$20 every thirty days thereafter, and in default of such payments, that he be proceeded against as for contempt. In the latter part of September 1908, the defendant left Seattle, remaining away, except at rare intervals, until his arrest. On January 26, 1910, the defendant having failed to make any further payments, an order of arrest was issued by the court. On April 23, 1913, he was arrested under this order, and was, at the same time, served with a summons and a petition, setting up the fact that neither the \$146, nor any of the subsequent installments of the support money had been paid, and praying that the defendant be punished as for contempt. On being arrested, the defendant answered this petition, and the court ordered that this answer stand as his answer to the order of arrest. Upon the hearing, the court announced that he would consider that the defendant had testified to all of the facts set forth in his answer. The defendant was cross-examined thereon, the plaintiff's testimony was taken, and thereupon the court made the order from which this appeal is taken.

It is first contended that the court erred in refusing to consider the allegations of the answer to the effect that the appellant, prior to the divorce decree, had conveyed to his wife their home in Seattle, of the value of more than \$5,000. We think the court did not abuse its discretion in refusing to consider matters antedating the decree and antedating the order of September 2, 1908, modifying the decree, since all such matters were presumably considered by the court at the time of the entry of the original decree and of the order modifying the decree and directing the appellant to pay \$20 a month for the support of his children.

It is next claimed that the court erred in that he failed to make any findings of fact or to recite in the order that the appellant has, or has had, during the term of the delinquency, financial ability to pay the sum required of him. Authorities from other jurisdictions, all of them relating to punishment for failure to pay alimony, are cited to the effect that formal findings of ability and contumacious refusal to pay are a prerequisite to punishment for contempt. It may be conceded that, where findings are requested, the failure of the court to make them would constitute reversible error, but in this case, the appellant is in no position to raise the point, since, at the time of his hearing and commitment, he neither requested any findings, nor made any objection or took exception to the failure of the court to make findings. *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634.

It is also urged that the appellant is now being punished for a violation of several distinct orders and for a failure to pay arrears of support money not due when the order of arrest of January 26, 1910, was made. In all matters relating to the custody and support of minor children contained in any decree of divorce, the jurisdiction of the trial court is a continuing one, so long as there are minor children to be provided for. *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *Fickett v. Fickett*, 39 Wash. 38, 80 Pac. 1134; *Dyer v. Dyer*, *supra*. The accumulation of arrears all relate back to

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Opinion Per ELLIS, J.

the original order of September 2, 1908, modifying the decree so as to require the appellant to pay \$20 a month for the support of his children. The order of arrest was made in aid of this decree so modified. The fact that the arrest was not made immediately after the order for arrest, nor until further arrears had accumulated, in no way affected the binding force of the modified decree or the continued jurisdiction of the court to enforce it. Moreover, a complaint was then filed and served upon the appellant, setting up the continued failure to pay and the accrual of further payments. The appellant thus had full notice of the scope of the proceedings, and waived any right to object by his answer to that petition upon the merits.

Finally, it is contended that the order adjudging the appellant in contempt was not sustained by sufficient evidence. After all of the many excuses set up in his answer, such as failure in business, inability to find work, and illness, which the court announced he would consider as having been testified to by the appellant, the appellant, on cross-examination, admitted that he had never contributed a cent to the support of his children since he left Seattle in 1908, and went to Methow and afterwards to British Columbia. Since that time, he has been in Seattle at different times, but only for short and uncertain intervals. Knowing not only the natural, but the legal obligation which he was under to support his minor children, he incurred the additional burden of another wife. No children have been born of this second marriage. He testified that, during the time since he left Seattle in September, 1908, he has been sick only once, when, as he expressed it, "I was out of commission for just one week." At the time of the hearing he was employed at \$3.50 a day. He admitted that his father, during this period, had given him more than \$500. He also admitted that he is a strong, healthy, able-bodied man. The only excuse which he advanced for not paying a cent toward the support of his minor children during all of this period, was that he was un-

able to do so. His answer shows that his credit was such that he has been able to run in debt over \$1,000. As said in *State ex rel. Ditmar v. Ditmar*, 19 Wash. 324, 53 Pac. 350:

"The evidence shows that the appellant here had borrowed some \$1,200 since this decree had been entered, and, if he was able to borrow money to pay his own debts or to invest in property, he was evidently able to obtain money to meet the demands of the decree."

As shown by the uncontradicted testimony of the wife, she has been supporting these children throughout this period by keeping boarders and working in a laundry. Outside of a few insignificant items of clothing given to the children by the appellant's parents, she has been supporting the children unaided. With the full record before us, and especially in view of the admissions of the appellant on his cross-examination, we entertain considerable sympathy with the sentiment of the trial court who, in announcing his ruling, said:

"It is impossible for me to believe that any strong, healthy man, such as this defendant, with a heart in his body, could contemplate the condition of his children for that lengthy period, without doing something to keep them in some degree of comfort. It is impossible for me to believe that he has not had the opportunity to send them as much as five dollars, or ten dollars, or something during that time. If there was ever a case of contempt of an order of court, this is one. Let the defendant be confined in the county jail for thirty days, unless he should make this payment within that time."

The appellant, if we have caught the gist of his argument, claims that, under the evidence, there was no reasonable ground for the presumption that he is able to pay, and that, before he can be punished as for contempt, the burden was on the other side to show such ability. This is not the correct rule. As said in *State ex rel. Smith v. Smith*, 17 Wash. 480, 50 Pac. 52:

"It is the duty of courts to enforce their orders, and when it comes to their knowledge that such orders are not obeyed

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Statement of Case.

they should require and enforce such obedience by punishment for contempt. The rule is that the burden of showing inability to comply with an order of this nature is upon the respondent. This is so well settled that we deem it unnecessary to make any citations from the numerous lines of authorities upon the subject."

The appellant has failed to meet this burden. Affirmed.

Crow, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[No. 11484. Department Two. January 29, 1914.]

CORNER MARKET COMPANY, *Appellant*, v. EUGENE GILLMAN,
Respondent.¹

LANDLORD AND TENANT—UNACCEPTED LEASE—TENANCY FROM MONTH TO MONTH—EVIDENCE—SUFFICIENCY. In an action of forcible entry and detainer, findings to the effect that the premises were not held under a written lease, and that the lessee was a tenant from month to month, are sustained where it appears that a former written lease had been made and abrogated by mutual consent before the tenant took possession, that the landlord executed a second lease, containing conditions, which to be binding, required the tenant's formal consent, but was not executed or otherwise consented to by him and was never delivered.

SAME—TENANCY FROM MONTH TO MONTH—NOTICE TO QUIT. A tenant from month to month cannot be ousted by an action of forcible entry and detainer, under Rem. & Bal. Code, § 812, unless notice to quit be served at least twenty days prior to the end of the period.

Appeal from a judgment of the superior court for King county, French, J., entered May 23, 1913, upon findings in favor of the defendant, dismissing an action of forcible entry and detainer, after a trial on the merits to the court. Affirmed.

D. C. Conover, for appellant.

Hammond & Hammond, for respondent.

¹Reported in 138 Pac. 2.

FULLERTON, J.—In the early part of the year 1912, the appellant erected a market building at the corner of First avenue and Pike street, in the city of Seattle. While the building was in the course of construction, the respondent entered into a contract with the appellant for a lease of a certain space or stall therein, in which to engage in the sale of fruit, groceries, eggs, and candies. A formal lease was made out purporting to lease to the respondent the premises described for a term of three years, from and after April 1, 1912, at a rental of \$250 per month, payable monthly in advance. At the time of the execution of the lease, the respondent paid to the appellant the sum of \$500, which the terms of the lease provided should, "in the event of the full and faithful performance of the contract by the said lessee, be credited in payment of the rent for the last two months of said term; but otherwise said payment this day made shall belong to the lessor, as a part consideration to it for the execution of the lease." Prior to the completion of the building, the parties entered into an agreement by which the lease was abrogated, and an agreement for another lease entered into. By the terms of the agreement, the new lease was to include a greater space than the original one, was to provide for a rental of \$362.50 per month, and the respondent was to have the privilege of selling vegetables in addition to the articles he was permitted to sell under the first lease; otherwise, it was to be subject to the same conditions, and run for the same term as the first lease. At the time of the making of this agreement, the respondent paid to the appellant the further sum of \$112.50, making the total sum paid on account of the lease \$612.50. A new lease was prepared and executed by appellant pursuant to the agreement, but the same was never executed by the respondent, nor, as the respondent testified and the court found, submitted to him for execution, nor did he know of its existence until the time of the trial of the present action.

The building was completed and ready for occupancy on

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April 4, 1912, and on that day the respondent entered into possession of the space agreed to be leased to him, paying the rental for the first month in advance. He continued to occupy the premises and pay the rent in advance up to December 1, 1912. In that month, when rent was demanded of him, he directed the appellant to apply on the rent such proportion of the sum as he had deposited with it as would be necessary to pay the rent, and declined to pay the rent otherwise. The appellant thereupon caused to be served upon him a notice to pay the rent or quit and surrender the premises within three days; and on his failure to do either, began the present action, under the statutes of forcible entry and detainer, to oust him from the premises. Issue was taken on the complaint, and a trial had before the court sitting without a jury, which resulted in a dismissal of the action. This appeal followed.

The trial court held that neither of the so-called leases was obligatory upon the respondent; that the first was cancelled and abrogated by the mutual consent of the parties prior to the time it was to go into effect; that the second was not executed by him, and that he never otherwise consented to be bound by its terms and conditions. The court further held that the respondent was a tenant from month to month, with a monthly rent reserved, and that a notice to quit the premises in order to be sufficient upon which to base an action of forcible detainer, must have been served at least twenty days prior to the end of such month, and that no such notice was served.

These conclusions, it seems to us, are the only conclusions that can be justly drawn from the evidence. It is not disputed that the first lease was abrogated by the mutual consent of the parties. It is equally clear that the second was never executed by the respondent, and that he never formally consented to its terms and conditions, although it contained covenants which, to be binding upon him, must have received his formal consent.

It is true, the appellant's witnesses testified that the second lease was prepared prior to the time the respondent entered the premises, and that the respondent was told that he could have the same by calling at the office of the appellant's agent for it. The respondent, however, denied that any such notice was given him, and the court found the facts in accord with his statement. But, if we were to conclude that the weight of the evidence justified a contrary finding, the result would not be different. Failure on the respondent's part to call for the lease cannot be construed as an acceptance of its terms. If the appellant desired that the respondent take the premises on conditions defined in a written instrument, its proper course was to see that the instrument was duly executed by him prior to the time of his entry into the premises. The effect of the act of the parties was, therefore, to create a tenancy from month to month with a monthly rent reserved. Such a tenancy can only be terminated by the landlord by serving upon the tenant a notice to quit the premises at the end of some such period at least twenty days prior thereto. Rem. & Bal. Code, §§ 812, subd. 2 (P. C. 81 § 1397); Id., § 8803 (P. C. 295 § 3). As no such notice was given the respondent, he could not be ousted by an action of forcible entry and detainer.

The judgment is affirmed.

Crow, C. J., MOUNT, MORRIS, and PARKER, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 11728. Department One. January 29, 1914.]

*In the Matter of the Estate of HENRY E. CHRISTENSEN.*¹

APPEAL—DECISIONS APPEALABLE—FINAL JUDGMENTS. A memorandum decision of the trial judge is a mere direction to counsel in the preparation of formal orders, and an appeal is premature where it does not appear that any formal judgment or decree was entered, or that the clerk made any minute of the decision.

Appeal from a memorandum decision of the superior court for Franklin county, Holcomb, J., entered August 14, 1913, holding the proceeds of life insurance policies exempt and not assets of the estate. Appeal dismissed.

Lovell & Davis, for appellant German-American State Bank.

William O'Connor, for appellant James W. McBurney.

Benton Embree, for respondent.

CHADWICK, J.—Henry E. Christensen died, leaving a widow and two children. His estate consists principally of about \$17,000 in life insurance, which has been collected by his administrator. Pending administration, the widow of the deceased filed a petition praying that the proceeds of the insurance policies be set apart as exempt, under Rem. & Bal. Code, § 569 (P. C. 81 § 881). The policies were made payable in part to his estate and in part to his executors and administrators. The administrator contested the petition of the widow, and the German-American State Bank filed a petition in intervention, setting up its interest in the estate as a creditor. The matter came on for hearing before Judge Holcomb, who rendered an elaborate opinion in which he held that the proceeds of the policies were exempt, and that the administrator could not charge them as assets of the estate,

¹Reported in 138 Pac. 1.

except for certain unpaid premiums which had been paid by him, and his usual commission as upon a fund passing through his hands. The opinion of the court was filed and is brought here as a part of the transcript. It is not made to appear that any formal judgment or decree was entered, nor does it appear that the clerk of the court made any minute of the memorandum decision of the judge. A motion to dismiss the appeal has been made on the ground that a memorandum decision of the court is not an appealable order.

While it is possible that the merit of this case could be as conveniently discussed under the present appeal as if a formal order had been entered below, we are nevertheless constrained to hold, in the interest of orderly procedure, that the appeal is premature. It has been the practice of this court—and in the light of the statute, Rem. & Bal. Code, §§ 442, 1716 (P. C. 81 §§ 787, 1193), no other practice should be tolerated—to treat a memorandum decision of the superior judge as a direction to counsel in the preparation of the formal orders contemplated by our practice acts. We think, therefore, that, until a formal order is entered denying the petition of the administrator and the petition in intervention of the German-American State Bank, no appeal can be prosecuted.

No cases covering the exact case before us have been cited, but it seems to us that the case of *Cline Piano Co. v. Sherwood*, 57 Wash. 239, 106 Pac. 742, is in point. The question there for the court to decide was whether a lien of an attorney would attach from the time the trial judge announced his conclusions, or at the time his ruling was formally entered as a judgment. We held, after reference to our own decisions, particularly *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029, that it was there

“Finally declared as the law in this state that the formal written judgment must be deemed the actual judgment of the court, and that previous recitals cannot ordinarily be held to be binding on the parties or the court.”

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The appeal will be dismissed without prejudice to either party, to apply to the court below for the entry of a formal order and to appeal therefrom.

CROW, C. J., GOSE, ELLIS, and MAIN, JJ., concur.

[No. 11617. Department Two. January 31, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Thomas W. Russell et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Respondents*.¹

CONTEMPT—PUNISHMENT. There is no inherent right vested in any particular judge to hear and determine a charge of constructive contempt committed out of the presence of the court.

VENUE—CHANGE—BIAS OF JUDGE—CONTEMPT—"PROCEEDING"—STATUTES—CONSTRUCTION. A prosecution upon information for constructive contempt, committed out of the presence of the court, is a "proceeding" within 3 Rem. & Bal. Code, §§ 209-1, 209-2, providing that no superior court judge shall sit to hear or try any action or proceeding when it is established that he is prejudiced against any party or attorney.

SAME—RIGHT TO CHANGE. Upon an application for a change of judges, seasonably made under 3 Rem. & Bal. Code, § 209-1, a party is entitled to the change as a matter of right.

Application filed in the supreme court October 18, 1913, for a writ of mandate to the superior court for King county, Humphries, J., to compel the transfer of a cause to another judge. Writ issued.

Geo. H. Rummens, for relators.

H. E. Foster, for respondent.

CROW, C. J.—The relators ask of this court a writ of mandamus, directed to Honorable John E. Humphries, judge of the superior court of King county, requiring him to transfer a certain cause to another judge for trial, to call in

¹Reported in 188 Pac. 291.

some other superior court judge to try the cause, or to request the governor to do so. Relators' application shows the following proceedings: On September 24th, 1913, H. E. Foster, as deputy prosecuting attorney in and for King county, presented to respondent an affidavit charging the relators, Thomas W. Russell and Emil Hendrickson, with a contempt of court committed out of the presence of the court, the substance of the charge being that, on September 22, 1913, a certain action was pending in the superior court of King county, in which the state of Washington was plaintiff and Millard Price and others, were defendants; that, prior to September 22, 1913, the relators unlawfully and wrongfully conspired with numerous other persons to interfere with the proceedings of the superior court in said cause; that they did so for the purpose of intimidating the respondent judge, before whom the cause was then pending, and that, with such intention, they adopted certain written resolutions of contemptuous character. A specific statement of the resolutions is unnecessary. Upon the filing of this affidavit, a citation was issued requiring the relators to appear before the superior court, and the Honorable John E. Humphries, judge thereof, to answer the charge of contempt.

Before further proceedings were had, the relators seasonably filed a motion in strict compliance with ch. 121, Laws 1911, p. 617 (§ Rem. & Bal. Code, §§ 209-1, 209-2), requesting a change of judges, and supported their motion with an affidavit, which, in the language of the statute, recited that the Honorable John E. Humphries, before whom the proceeding was then pending, was prejudiced against each of them, and against their interest in the cause. Their affidavit in substance further alleged that the respondent John E. Humphries, from the bench, and in open court, on several occasions, had expressed his feelings openly and publicly relative to the relators; that he had stated they were guilty of contempt, and that he intended to adjudge them guilty and sentence them to jail. Respondent denied the

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motion, struck the affidavits, and ordered the relators to appear before him for trial on October 3, 1913. Thereupon, they applied to this court for an alternative writ of mandamus, and a show cause order, which was issued.

Respondent has interposed a motion to quash on the ground that the alternative writ was irregularly and improperly issued. It will be unnecessary to pass upon this motion, as the cause is now before us for hearing upon the merits, and the vital question at this time is, whether a peremptory writ shall issue.

Relators are charged with a constructive contempt, predicated on alleged acts done out of the presence of the court, which acts tended to belittle and degrade the court, and were intended to interrupt, prevent, and embarrass the administration of justice. Respondent contends that ch. 121, Laws 1911, p. 617, does not apply to prosecutions for contempt, as the superior court has inherent power to summarily hear and determine such causes and punish all parties who may be in contempt; that the judiciary is a coordinate branch of the government; that its inherent right to punish parties guilty of contempt cannot be destroyed; and that the legislature has no power to withdraw this inherent power from the courts.

An argument of this kind might well be made relative to the right of a court to summarily punish for a direct contempt committed in the immediate presence of the court, but that question is not before us and need not be determined at this time. A different question is presented where a party is charged with constructive contempt committed out of the presence of the court, as, in such an instance, no such inherent right is necessarily vested in any particular judge of the court. The act of 1911 provides:

"Sec. 1. No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or

the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; . . .

"Sec. 2. Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge; . . ." 3 Rem. & Bal. Code, §§ 209-1, 209-2.

That a prosecution upon information for constructive contempt committed without the presence of the court is a *proceeding* in contemplation of this statute cannot be successfully questioned. In *Lamonte v. Ward*, 36 Wis. 558, it was held, under a statute authorizing the removal of any cause or "matter," that a contempt proceeding if not a cause was at least a "matter" and could be removed. In *Back v. State*, 75 Neb. 603, 106 N. W. 787, a prosecution for constructive contempt, the court held that contempt cases are removable as other cases, although it was further held that the showing there made was insufficient to require a removal.

A discussion of the facts is unnecessary. Relators' affidavit filed in this court in support of their application is sufficient to show not only that the respondent judge was prejudiced against the relators, but also shows that, in open court, and in advance of any hearing, he made an announcement of his intention to imprison them in punishment for the alleged contempt. We have frequently held that, upon a showing seasonably made in compliance with the statute, a moving party is entitled to a change of judges as a matter of right. *State ex rel. Nelson v. Yakey*, 64 Wash. 511, 117 Pac. 265; *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40; *State ex rel. Jones v. Gay*, 65 Wash. 629, 118 Pac. 830; *State ex rel. Moore v. Superior Court*, 70 Wash. 362, 126 Pac. 926.

On the record before us, relators were entitled to an order for a change of judges. It therefore follows that a writ of mandamus should issue directing the respondent judge to grant their motion.

Let the writ issue.

PARKER, MORRIS, FULLERTON, and MOUNT, JJ., concur.

[No. 10896. Department Two. February 2, 1914.]

PUBLIC SERVICE COMMISSION, *on the Relation of Transportation Bureau of Tacoma Commercial Club, Respondent,*
v. NORTHERN PACIFIC RAILWAY COMPANY,
*Appellant.*¹

CARRIERS—RATES—REGULATION—UNLAWFUL DISCRIMINATION—REASONABLENESS. Under 3 Rem. & Bal. Code, § 8626-21, providing that no common carrier shall give any undue or unreasonable preference or advantage to any person or locality, a community is entitled to something more than mere reasonable rates, since the rates must be relatively equal to all shippers where there is no structural or operative difference favoring a haul from one point over a haul from another to the same shipping points.

SAME—DISCRIMINATION—EFFECT OF COMPETITION—REASONABLENESS—EVIDENCE—SUFFICIENCY. Under 3 Rem. & Bal. Code, § 8626-21, providing that no common carrier shall give any undue or unreasonable preference to any person or locality, it is an unreasonable and unlawful discrimination for a railroad company to charge less rates on class commodities from Seattle than from Tacoma to the "jobbing center" of Spokane and tributary points, in order to meet the competitive rates of another railway having a shorter line from Seattle, where it appears that there were no structural, operative or other conditions favoring the haul from Seattle, which was slightly longer than the haul from Tacoma, the difference in rates being sufficiently great to drive the Tacoma manufacturers and jobbers from the markets.

SAME—STATUTES—CONSTRUCTION. 3 Rem. & Bal. Code, § 8626-21, forbidding a carrier from giving undue or unreasonable preference

¹Reported in 138 Pac. 270.

or advantages to persons or localities, applies in all instances where no transportation difference intervenes, regardless of the question whether the person, locality, or traffic is affected by the competition of a rival or not.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered October 11, 1912, affirming an order of the public service commission in favor of the plaintiff, compelling the defendant to equalize its class rates between distribution points. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant, contended, among other things, that it is not unjust or unreasonable discrimination to meet the short line competitive rates of a rival road. *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1; *Morrell & Co. v. Chicago, B. & Q. R. Co.*, 20 I. C. C. 400; *Omaha Grain Exchange v. Chicago & N. W. R. Co.*, 19 I. C. C. 424; *Fisk & Sons v. Baltimore & M. R. Co.*, 19 I. C. C. 299; *Columbia Grocery Co. v. Louisville & N. R. Co.*, 18 I. C. C. 502; *Blake & Sons Hardware & Mfg. Co. v. Baltimore & Ohio R. Co.*, 20 I. C. C. 139; *American Cigar Co. v. Philadelphia & Reading R. Co.*, 20 I. C. C. 81; *Corporation Commission of North Carolina v. Norfolk & W. R. Co.*, 19 I. C. C. 303; *Breese-Trenton Min. Co. v. Wabash R. Co.*, 19 I. C. C. 598; *Railroad Commission of Nevada v. Southern Pac. Co.*, 21 I. C. C. 329, 366; *Business Men's League v. Baltimore & Ohio R. Co.*, 24 I. C. C. 125; *Chamber of Commerce of Minneapolis v. Great Northern R. Co.*, 5 I. C. C. 571; *Superior Commercial Club v. Great Northern R. Co.*, 24 I. C. C. 96.

The Attorney General and Stephen V. Carey, Assistant, for respondent, contended that it is the function of the commission to pass upon the merits of rate controversies. The courts cannot interfere unless it clearly appears that the commission has exceeded its constitutional or statutory powers or

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Citations of Counsel.

that its decision is based upon a palpably erroneous misapplication of law. *Joynes v. Pennsylvania R. Co.*, 17 I. C. C. 361; *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452; *Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 470, 478; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 103; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541; *Puget Sound Elec. R. v. Railroad Commission*, 65 Wash. 75, 117 Pac. 789, Ann. Cas. 1913 B. 763. Every community is entitled to rates that are, first, inherently reasonable, and, second, that are relatively reasonable; that is, not discriminatory. *Railroad Commissioners of Florida v. Seaboard Air Line R.*, 16 I. C. C. 1; *Railroad Commission of Nevada v. Southern Pac. Co.*, 21 I. C. C. 329; *Elk Cement & Lime Co. v. Baltimore & Ohio R. Co.*, 22 I. C. C. 84; *Mobile Chamber of Commerce v. Mobile & O. R. Co.*, 23 I. C. C. 417. A carrier cannot be required to meet water competition, market competition or the competition of a rival line; but if it does elect to meet such competition for one community, it must meet it for all communities similarly situated. Failure to do so is an unjust and undue and consequently an unlawful, discrimination. *Railroad Commission of Nevada v. Southern Pac. Co.*, *supra*; *Spokane v. Northern Pac. R. Co.*, 21 I. C. C. 400; *Milburn Wagon Co. v. Lake Shore & M. S. R. Co.*, 22 I. C. C. 98; *Traffic Bureau of Sioux City Commercial Club v. Chicago & N. W. R. Co.*, 22 I. C. C. 110; *Chamber of Commerce of Ashburn v. Georgia Southern & Florida R. Co.*, 23 I. C. C. 140; *Long and Short Haul Docket*, No. 1243, 22 I. C. C. 366. It is not the province of a railroad to make and unmake markets and commercial centers. *Sufferin Grain Co. v. Illinois Cent. R. Co.*, 22 I. C. C. 178; *Alpha Portland Cement Co. v. Baltimore & Ohio R. Co.*, 22 I. C. C. 446. The fact that a discrimination is slight does not excuse its

existence. If it exists at all and is not defensible for some good transportation reason, it must be eliminated. *Fort Dodge Commercial Club v. Illinois Cent. R. Co.*, 16 I. C. C. 572. The possibility of other cities demanding rate adjustments is not a good reason for refusing relief where it appears as a fact that a discriminatory condition exists. *Chamber of Commerce of Newport News v. Southern R. Co.*, 23 I. C. C. 345.

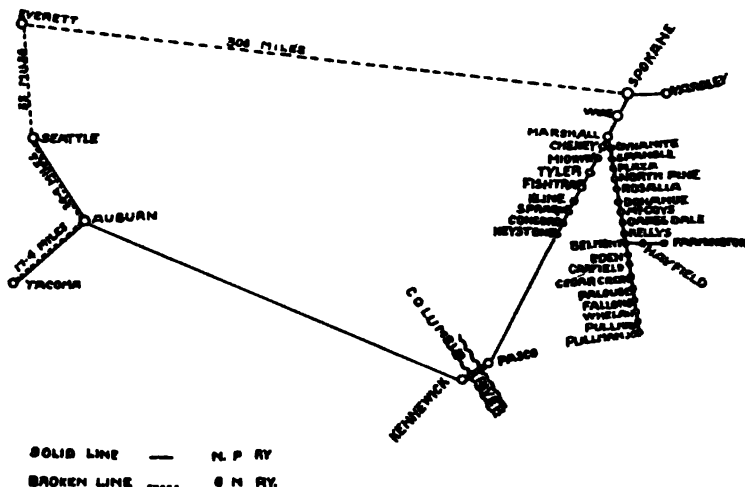
FULLERTON, J.—On February 5, 1912, the public service commission of Washington promulgated an order, effective March 2, 1912, applicable to the several railroad companies operating lines within the state, fixing maximum charges which it would thereafter be lawful to make for the transportation of certain class commodities over their respective lines from certain named jobbing centers. The order is known as the distributive rate order. In it the commission finds that certain named cities in the state of Washington, which includes the cities of Spokane, Everett, Seattle and Tacoma, are jobbing centers; it finds that the then prevailing distance tariff rates on class commodities shipped from these centers are unjust, unreasonable, and excessive, and finds that certain lesser charges were just, reasonable, and remunerative. It then ordered that the named commodities should thereafter be carried at a rate not to exceed the maximum so found to be reasonable. The order did not fix maximum rates between different specific points. A scale of maximum mileage rates was established, and the carriers affected thereby were left to adjust their rates within the maximum so established.

It is well here to explain that by class commodities are meant commodities carried under class rates. In the state of Washington, these classes are principally of ten sorts, in each of which many different commodities are assigned. A given rate is fixed for the first class, and the others are based

on a percentage of the first class rate, the rate growing less as the scale descends. All commodities, however, are not thus classified. Distinct rates are established for commodities which move regularly in large quantities, such, for instance as hay, grain, coal, lumber, etc., carried in carload lots. The class rates are intended to cover, principally, goods handled by jobbers in commercial centers, and include such commodities as groceries, hardware, drygoods, and the principal manufactured articles. The question here involves class rates only.

The order of the commission affected the freight charges of both the Great Northern Railway Company, and the Northern Pacific Railway Company. Prior to the time the order went into effect, these companies had uniform rates from the principal shipping points on Puget Sound to the various points in the eastern part of the state. The Great Northern Railway Company, however, has much the shorter line across the state, and its mileage became a controlling factor in fixing the rates under the commission's order. By the lines of the Great Northern Railway, the distance from Tacoma to Spokane is 377 miles; and from Seattle to Spokane it is 389 miles. By the Northern Pacific Railway Company's line, the distance from Tacoma to Spokane is 395.1 miles, and from Seattle to Spokane it is 398.6 miles. The order of the commission permitted a maximum rate on commodities falling within the first class, based on the mileage of the Great Northern Railway Company, of \$1.07 per hundred pounds between Tacoma and Spokane, and \$.99 per hundred pounds between Seattle and Spokane, while a rate based on the mileage of the Northern Pacific Railway Company between the same points would permit a charge of \$1.10 per hundred pounds. Since the city of Spokane was also made by the order "a jobbing center," the shorter mileage of the Great Northern Company affected the rates to the various points in the territory surrounding that city, although not reached by the Great Nor-

thern lines, but which are reached by the lines of the Northern Pacific Company. The relative situation is shown on the rough sketch following:



On the going into effect of the commission's order, the Great Northern Railway Company readjusted its class rates to the maximum permitted by the order, making the first class rate 107 cents per hundred pounds for all freight originating at Tacoma, and 99 cents per hundred pounds for all freight originating at Seattle. On readjusting its rates, the Northern Pacific Railway Company disregarded its own mileage, and based its rates on the mileage of the Great Northern Railway Company, also making a rate of 107 cents per hundred pounds for all freight originating at Tacoma, and 99 cents per hundred pounds for all freight originating at Seattle, although, as we have shown, the actual distance over its lines is greater between Seattle and Spokane than it is between Tacoma and Spokane. This difference in the rates between the principal points named also compelled a difference in the rates between Seattle and Tacoma and the places sur-

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rounding Spokane. These differences are shown in the following table:

Distances			Class rates per one hundred pounds.										
To	From	Miles	1	2	3	4	5	A	B	C	D	E	
Yardley	Tacoma	398.6	110	94	77	66	55	55	44	33	28	22	
	Seattle	402.1	109	93	76	65	55	55	44	33	28	22	
	Difference favor Seattle		1	1	1	1	0	0	0	0	0	0	
Spokane	Tacoma	395.1	107	91	75	64	54	54	43	32	27	21	
	Seattle	398.6	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		8	7	6	5	4	4	3	2	2	1	
Wins	Tacoma	388.5	107	91	75	64	54	54	43	32	27	21	
	Seattle	392.0	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		8	7	6	5	4	4	3	2	2	1	
Marshall	Tacoma	385.8	107	91	75	64	54	54	43	32	27	21	
	Seattle	389.3	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		8	7	6	5	4	4	3	2	2	1	
Cheney	Tacoma	378.5	107	91	75	64	54	54	43	32	27	21	
	Seattle	382.0	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		8	7	6	5	4	4	3	2	2	1	
Midway	Tacoma	373.6	106	90	74	64	53	53	42	32	27	21	
	Seattle	377.1	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		7	6	5	5	3	3	2	2	2	1	
Tyler	Tacoma	367.9	105	89	74	63	53	53	42	32	26	21	
	Seattle	371.4	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		6	5	5	4	3	3	2	2	1	1	
Fishtrap	Tacoma	364.0	104	88	73	62	52	52	42	31	26	21	
	Seattle	367.5	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		5	4	4	3	2	2	2	1	1	1	
Kline	Tacoma	358.9	103	88	72	62	52	52	41	31	26	21	
	Seattle	362.4	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		4	4	3	3	2	2	1	1	1	1	
Sprague	Tacoma	353.7	102	87	71	61	51	51	41	31	26	20	
	Seattle	357.2	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		3	3	2	2	1	1	1	1	1	0	
Concord	Tacoma	349.5	101	86	71	61	51	51	40	30	25	20	
	Seattle	353.0	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		2	2	2	2	1	1	0	0	0	0	
Keystone	Tacoma	343.9	100	85	70	60	50	50	40	30	25	20	
	Seattle	347.4	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		1	1	1	1	0	0	0	0	0	0	
Dynamite	Tacoma	391.1	107	91	75	64	54	54	43	32	27	21	
	Seattle	394.6	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		8	7	6	5	4	4	3	2	2	1	
Spangle	Tacoma	397.	107	91	75	64	54	54	43	32	27	21	
	Seattle	400.5	99	84	69	59	50	50	40	30	25	20	
	Difference favor Seattle		8	7	6	5	4	4	3	2	2	1	

Distances			Class rates per one hundred pounds.									
To	From	Miles	1	2	3	4	5	A	B	C	D	E
Freedom	Tacoma	107.2	91	75	64	54	54	43	32	27	21	
	Seattle	99	84	69	59	50	50	40	30	25	20	
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Plaza	Tacoma	405.2	91	75	64	54	54	43	32	27	21	
	Seattle	99	84	69	59	50	50	40	30	25	20	
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
No. Pine	Tacoma	409.1	91	75	64	54	54	43	32	27	21	
	Seattle	412.6	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Rosalia	Tacoma	412.4	91	75	64	54	54	43	32	27	21	
	Seattle	415.9	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Broadview	Tacoma	413.8	91	75	64	54	54	43	32	27	21	
	Seattle	417.3	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Donahue	Tacoma	414.4	91	75	64	54	54	43	32	27	21	
	Seattle	417.9	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
McCoy's	Tacoma	417.6	91	75	64	54	54	43	32	27	21	
	Seattle	421.1	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Oakesdale	Tacoma	423.3	91	75	64	54	54	43	32	27	21	
	Seattle	426.8	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Kelly's	Tacoma	426.	91	75	64	54	54	43	32	27	21	
	Seattle	429.5	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Belmont	Tacoma	428.6	91	75	64	54	54	43	32	27	21	
	Seattle	432.1	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Haysfields	Tacoma	432.1	91	75	64	54	54	43	32	27	21	
	Seattle	435.6	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Farm- ington	Tacoma	434.1	91	75	64	54	54	43	32	27	21	
	Seattle	437.6	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Eden	Tacoma	432.9	91	75	64	54	54	43	32	27	21	
	Seattle	436.4	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Garfield	Tacoma	435.1	91	75	64	54	54	43	32	27	21	
	Seattle	438.6	99	84	69	59	50	50	40	30	25	20
Difference favor Seattle			8	7	6	5	4	4	3	2	2	1
Cedar Cr'k	Tacoma	438.7	91	75	64	54	54	43	32	27	21	
	Seattle	442.2	105	89	74	63	53	53	42	32	26	21
Difference favor Seattle			2	2	1	1	1	1	1	0	1	0

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Distances			Class rates per one hundred pounds.									
To	From	Miles	1	2	3	4	5	A	B	C	D	E
Palouse	Tacoma	444.7	107	91	75	64	54	54	43	32	27	21
	Seattle	448.2	105	89	74	63	53	53	42	32	26	21
Difference favor Seattle			2	2	1	1	1	1	1	0	1	0
Fallon's	Tacoma	451.3	107	91	75	64	54	54	43	32	27	21
	Seattle	454.8	105	89	74	63	53	53	42	32	26	21
Difference favor Seattle			2	2	1	1	1	1	1	0	1	0
Whelan	Tacoma	456.1	107	91	75	64	54	54	43	32	27	21
	Seattle	459.6	105	89	74	63	53	53	42	32	26	21
Difference favor Seattle			2	2	1	1	1	1	1	0	1	0
Pullman	Tacoma	459.3	107	91	75	64	54	54	43	32	27	21
Spur	Seattle	462.8	105	89	74	63	53	53	42	32	26	21
Difference favor Seattle			2	2	1	1	1	1	1	0	1	0
Pullman	Tacoma	462.7	107	91	75	64	54	54	43	32	27	21
Jct.	Seattle	466.2	105	89	74	63	53	53	42	32	26	21
Difference favor Seattle			2	2	1	1	1	1	1	0	1	0

After the tariff schedule had been put into effect, the transportation bureau of the Tacoma Commercial Club complained to the public service commission concerning it, alleging that the rates prescribed gave an undue and unreasonable preference and advantage with respect to the transportation of class commodities to the manufacturers, jobbers, and wholesale dealers of Seattle over like manufacturers, jobbers, and wholesale dealers of Tacoma. A citation was issued to the railroad company directing it to answer the complaint, and thereafter a hearing was had, which resulted in an order directing that the class rates between Seattle and Tacoma, respectively, and the points named in the foregoing table, be equalized so that the class rates from Tacoma thereto should not be greater than the class rates thereto from Seattle. From this order, an appeal was taken to the superior court of Pierce county, where the order was affirmed. The present appeal is from the judgment of the last named court affirming the order.

The section of the statute upon which the commission based its order is found in the public service commission law, and reads as follows:

"Sec. 21. No common carrier shall make or give any undue or unreasonable preference or advantage to any person or

corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Laws 1911, p. 555, § 21 (3 Rem. & Bal. Code, § 8626-21).

The appellant contends that this section is not applicable to the facts shown in the present record. It contends that the prohibition therein is directed against undue and unreasonable preferences and advantages to one locality over another voluntarily and wrongfully given by the carrier, and do not relate to such preferences and advantages as are forced upon the carrier in the necessary competition for business; and it argues that its act in fixing a lower class rate for freight from Seattle to the points named in its schedule than it granted to Tacoma was not voluntary or wrongful, since it was forced to do so in order to meet the schedule of a competing carrier, else abandon the carrying business to the points named for freight originating at Seattle. It calls attention, also, to the fact that its class rates as fixed by its schedules are within the maximum rates permitted by the public service commission in its distributive rate order, and that they are not by the complainants contended to be other than just and reasonable rates.

In support of its contentions, the appellant cites and relies chiefly on the case of *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1. In that case, it appears that the Board of Trade of Chattanooga, Tennessee, a chartered corporation, petitioned the Interstate Commerce Commission for relief under the act to regulate commerce. The defendants the East Tennessee, Virginia and Georgia Railway, and numerous other rail and steamship companies, were alleged to be common carriers subject to the act to regulate commerce, and engaged in the transportation of freight from Boston, New York, Philadelphia, Baltimore and other places on the Eastern seaboard to Chattanooga, Nashville

and Memphis, in the state of Tennessee, and that they conveyed freight from the points named on the eastern seaboard through and beyond Chattanooga to Nashville and Memphis for a lesser rate to such long distance points than was charged by them for like freight to Chattanooga, the shorter distance. this it was averred was in violation of the provisions of the commerce act prohibiting a greater charge for a shorter than for a longer haul, and also a violation of the further provisions of the act forbidding the giving of undue and unreasonable preferences. The defendants named defended on the ground that a certain other carrier had put in rates to Nashville from the seaboard points named which were less than the defendants' rates, and that they had been compelled to lower their own rates to that point in order to participate in the Nashville business. The commission held that their action in so doing was in violation of the commerce act, and entered an order forbidding the defendants to charge a greater compensation for the shorter distance to Chattanooga than was charged by them for the longer distances to Nashville and Memphis. This order was affirmed in the Circuit Court of the United States, in which an action was begun to enforce the order of the commission, 85 Fed. 107; and on appeal was affirmed by the Circuit Court of Appeals for the Sixth Circuit, 99 Fed. 52. On appeal to the Supreme Court, however, the order was reversed on the ground that the competition complained of by the defendants justified a greater charge for the shorter than the longer haul, and consequently did not constitute an unlawful discrimination. In the course of the opinion, the court, after reciting the arguments used by the commissioners in support of their order, and quoting excerpts from the earlier cases of the Supreme Court thought to sustain it, used this language:

"It is not difficult to perceive the origin of the fallacy upon which the contention rests. It is found in blending the third and fourth sections in such a manner as necessarily to destroy one by the other instead of construing them so as to cause

them to operate harmoniously. In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And especial attention was directed to this view in the *Behlmer* case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination

against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge. Indeed, the findings of fact made by the commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play."

It has seemed to us, however, that this case is not in point on the question now before us. In the first place, it will be observed from the language of the opinion that the decision is made to rest largely, if not entirely, on that clause of the long and short haul section of the commerce act confining the operation of the section to hauls "under substantially similar circumstances and conditions," which has since been eliminated by an amendment to the act, and which never had any place in the similar section contained in our own act. The change in the statute in this respect was material. As the statute read at the time of the decision, greater compensation for shorter than longer hauls were prohibited only in cases where the circumstances and conditions were substantially similar;

now, such charges were prohibited under all circumstances and conditions except where specially permitted by the commission. This, it seems to us, is sufficient in itself to render it doubtful whether the court would, should a similar question be presented to it for adjudication, regard the decision as authority upon the question. In the second place, the facts of the cases are not the same. In that case, all shippers of freight were treated alike; all could ship to Chattanooga at one price, and all to Nashville at one price, the consumer only being affected because of the higher rate to Chattanooga than to Nashville. In the case before us, the discrimination is made at the point of origin of the shipment, and is made between shippers of freight shipping wholly over the lines of the company making the discrimination, where the distances are practically the same, and where no structural, operative or other conditions intervene which make the cost of haul greater from the one point than from the other.

We think, therefore, that we may treat the question then as one of first impression; and doing so, it remains to inquire whether there is a just cause for the discrimination of which complaint is made. By the section of the public service commission law above quoted, carriers are forbidden to make or give undue or unreasonable preferences or advantages to any person, or to any locality, or to any particular description of traffic. This means that a community is entitled to something more at the hands of the carrier than a mere reasonable rate, for rates must not only be reasonable in and of themselves, but they must be relatively reasonable; the duty imposed is to give equal treatment to all shippers, whatever their relative situation so long as the differences do not unequally affect the carrier. Carriers are not, of course, compelled to equalize natural disadvantages; such, for example, as arise from unequal length of haul, cost of production of the articles shipped, or the like; the prohibition only militates against discrimination where the conditions are like or similar. As we have said, there is no structural or operative differences which

would favor a haul from Seattle to the shipping points named over a haul from Tacoma to the same points. Indeed, the differences, if any exist, lie in favor of Tacoma, as the haul from that place to the points named is slightly less in distance than is the haul from Seattle.

The claim of right made by the appellant to make a less rate from Seattle to these points than it made from Tacoma rests entirely on the fact that a competitor had made such a less rate, and that it was compelled to meet this rate or else lose the traffic originating at that point. Is this reason sufficient? Aside from the general question, it seems to us that the record demonstrates that in the particular case it is not. Were the city of Seattle a city of minor importance as a manufacturing and distributing point, and its shipments inconsequential, there would doubtless be some merit in the claim. But the contrary is the fact. The record made by the commission abundantly shows that Seattle is one of the principal distributing points on the Northwest coast, and that its manufacturers and jobbers enter into active competition with the manufacturers and jobbers of Tacoma and elsewhere for the trade of the markets named. The record shows, also, that the commodities usually carried under class rates are handled by the jobbers and manufacturers at a close margin of profit, and that the differential in rates made in this instance is sufficiently great to drive the Tacoma jobbers and manufacturers from these markets. This being true, the appellant railway can derive no profit because of the higher rate from Tacoma. It will still do the hauling on this class of goods at Seattle rates, but it will haul all of them from Seattle instead of dividing the haul between the two cities as it had formerly done. This is discrimination without justification, and is both unreasonable and unlawful.

But we think a judgment affirming the commission's order may rest on broader grounds. We think the section of the statute forbidding a carrier from giving undue and unrea-

sonable preferences or advantages to persons, localities, or particular descriptions of traffic, must apply in all instances where no transportation differences intervene, regardless of the question whether the person, locality, or description of traffic is affected by the competition of a rival carrier or not. If, to take the present instance, the Northern Pacific Railway Company may lawfully discriminate between Seattle and Tacoma in its freight charges between these points and the points of consumption, it may, on the same principle, lawfully discriminate between shipments originating wholly in Seattle. It may make one rate for a Seattle shipper whose shipping warehouse is accessible to the Great Northern Railway Company, and another and higher rate to the same point for a shipper whose warehouse is not so accessible. And since the rates of its rival are alone to be considered, no reason can be suggested why, under the same rule, varying rates for different shippers might not be made owing to the accessibility of the point of origin of the shipment to the rival railway company's lines. It seems to us that this cannot be the purport of the legislative enactment. The only alternative rule, then, is to require equal treatment for all persons, localities, and descriptions of traffic whose relations to the shipping carrier are like and similar. The order of the commission in the case before us exacts no more than this, and should be affirmed. It will be so ordered.

CROW, C. J., MAIN, ELLIS, and MORRIS, JJ., concur.

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Opinion Per PARKER, J.

[No. 11789. Department Two. February 8, 1914.]

THE STATE OF WASHINGTON, *on the Relation of C. H. Kiehl et al., Plaintiff*, v. I. M. HOWELL, *Secretary of State, Respondent*.¹

STATUTES—SUBMISSION—INITIATIVE MEASURES—TIME FOR FILING—CONSTRUCTION. 3 Rem. & Bal. Code, § 4971-1, providing that measures to be submitted upon initiative petition shall be filed within ten months prior to the election, does not require filing ten months prior to the election, but limits the time within which they may be filed to "less than ten months" before election.

SAME—INITIATIVE MEASURES—TIME FOR FILING—POWER OF LEGISLATURE—STATUTES—CONSTRUCTION. Under the initiative and referendum amendment to the constitution (Laws 1911, pp. 137, 139), providing that petitions shall be filed with the secretary of state not less than four months before the election, and if so filed, the measure shall be submitted to the electors, and declaring that the section is self executing but that legislation may be enacted to facilitate its operation, the legislature has power to fix a reasonable time preceding the election within which a proposed measure shall be filed with the secretary of state, as an act to "facilitate" the initiative and referendum; and the fixing of ten months before the election, leaving but six months within which to complete and file the petitions, is not unreasonable.

Application filed in the supreme court January 21, 1914, for a writ of mandamus to compel the secretary of state to act upon a proposed initiative measure. Denied.

L. E. Kirkpatrick, for relators.

The Attorney General and *Scott Z. Henderson*, *Assistant*, for respondent.

PARKER, J.—This is a mandamus proceeding, commenced in this court, wherein the relators seek to compel the secretary of state to transmit a copy of a proposed initiative measure, filed in his office, to the attorney general, to the end that there may be formulated a ballot title thereof, as provided by the Laws of 1913, page 418, preliminary to the cir-

¹Reported in 138 Pac. 286.

culatation of, and procuring signatures to, petitions for the submission of the proposed measure to a vote of the people at the general election to be held in November, 1914. The cause is submitted to us upon the demurrer of the secretary of state to the relators' petition. From the briefs and argument of counsel, it is apparent that the secretary of state has declined to proceed as demanded by the relators, because the proposed initiative measure was filed in his office more than ten months prior to the date of the general election of 1914, which fact appears in the allegations of the relators' petition. The question here presented is: Does this fact justify the secretary of state in declining to proceed as demanded by the relators?

The initiative and referendum amendment to our constitution, adopted in 1912, provides, among other things, as follows:

"Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon . . . If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. . . . All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation." Laws of 1911, pp. 187, 189.

The legislature of 1913 passed an act "facilitating the operation of the initiative and referendum." Laws of 1913, p. 418. That act, so far as we need here notice its provisions, reads as follows:

"Sec. 1. . . . Measures to be submitted upon initiative petition shall be filed within ten months prior to the election or the session of the legislature at which they are to be submitted. The secretary of state shall give to each such measure a serial number, using a separate series for initiative and referendum measures, respectively, and forthwith transmit to

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the attorney general a copy of such measure bearing its serial number . . . (§ Rem. & Bal. Code, § 4971-1).

"Sec. 2. Within ten days after the receipt of any such measure, the attorney general shall formulate therefor and transmit to the secretary of state a ballot title of not to exceed one hundred words, bearing the serial number of such measure, which ballot title may be distinct from the legislative title of such measure, and shall express, and give a true and impartial statement of the purpose of such measure." (Id., § 4971-2.)

Then follow provisions relating to the form of and circulation of the petitions, verifying the signers to be legal voters, publication, conduct of the election, canvass of vote, etc.

It is suggested, though we do not understand it to be seriously contended, that the words "measures to be submitted upon initiative petition shall be filed within ten months prior to the election," mean that such measures shall be filed with the secretary of state more than ten months prior to the election. We are unable to see that there is any ground for so contending. The language is too plain for construction. "Within ten months" plainly means "less than ten months" before election.

It is contended by counsel for the relators that, in so far as this law thus limits the time within which an initiative measure may be filed with the secretary of state preliminary to the circulation of petitions for submission of such a measure to the people, the law is in violation of the initiative and referendum amendment to the constitution. It is first argued that the terms of that amendment, in effect, prohibit the legislature from fixing any limit upon the time within which proposed initiative measures may be filed with the secretary of state. The argument seems to be that, since the constitutional amendment provides that the petitions of the voters shall be filed with the secretary of state "not less than four months before the election;" and, "if filed at least four months before the election . . . he shall submit the same to the vote of the people," the legislature is thereby, in effect, prohibited from fixing any limit of time within which a proposed

measure may be filed and circulation of petitions thereon commenced. We cannot agree with this contention. The legislature is expressly authorized to enact laws to facilitate the initiative and referendum. It seems clear to us that a limitation upon the time within which, prior to the election, a proposed measure may be filed and the procuring of signatures of voters to the petitions commenced, is a proper subject of legislation, looking to orderly procedure and fairness to the electors. While the constitutional amendment is declared to be self-executing, it is apparent that its execution would be almost, if not wholly, impracticable without legislation of some such nature as this. It, of course, is necessary that some practical test be provided for determining whether the signers of the petitions are legal voters. It is, of course, but fair that the petitions should, so far as practical, be signed only by those who would be voters at the election. This can be secured with greater certainty by having the petitions signed as near the time of the election as practical. We all know that our electorate is not the same from year to year. We are of the opinion that it is within the power of the legislature to fix a reasonable limit of time preceding the election within which an initiative measure may be filed with the secretary of state.

It is further contended by counsel for the relators that the act is, in any event, in violation of the initiative and referendum amendment because ten months is an unreasonably short time for the preparation and circulation of petitions asking submission of a proposed initiative measure to the voters, in view of the fact that the petitions must be filed with the secretary of state at least four months before the election, leaving only six months in which to prepare, circulate and procure signatures to the petitions. We are clearly of the opinion that this is a matter of legislative discretion with which we cannot interfere; in any event, not unless a limit of time should be fixed so short as to practically destroy the right guaranteed by this constitutional amendment. Plain-

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ly, six months is not an unreasonably short time for the circulation and procuring signatures to petitions.

The writ is denied.

Crow, C. J., Mount, Morris, and Fullerton, JJ., concur.

[No. 11810. Department Two. February 4, 1914.]

C. R. GANNAWAY *et al.*, Respondents, v. PUGET SOUND
TRACTION, LIGHT & POWER COMPANY, Appellant.¹

CARRIERS—PASSENGERS—RELATION—STREET RAILWAYS—ACCIDENTS TO PERSONS NEAR TRACKS. Where plaintiffs had alighted from a street car upon a platform, and were walking along the side of the car, they ceased to be passengers, and the company was not liable when the car was started around a curve, causing the overhang of the car to swing out and strike the plaintiffs; as ordinary prudence required plaintiffs to take notice that there was an overhang to an ordinary street car when rounding a curve.

CARRIERS—INJURY TO PASSENGERS—SETTING DOWN PASSENGERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. It is not negligence for a street car conductor to fail to notice that passengers who had alighted near a curve had placed themselves in a place of danger from the overhang of the car when the car was started around the curve, where it appears that the accident happened after dark, and the lights inside the car prevented the conductor from seeing anything outside.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 28, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian struck by the overhang of a street car rounding a curve. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Reynolds, Ballinger & Hutson, for respondents.

PER CURIAM.—The appellant owns and operates a street railway system in the city of Seattle. One of its lines, known

¹Reported in 138 Pac. 267.

as the Fauntleroy Park line, passes for a part of the way along 28th avenue southwest, to its junction with Andover street, where it turns to the right and passes on its way over that street. The track is laid to the left of the center of the streets. The street known as 28th avenue southwest, is paved with planking for its full width on the right or east of the car tracks from its junction with Andover street for some distance south. There is no paving of any kind between the tracks, nor on the street to the left or west thereof. The cars operated over this line are of a large double-trucked type, having a front and rear exit opening on the right of the car. Passengers traveling north over 28th avenue southwest, and desiring to alight at its junction with Andover street, are of necessity let out onto the east side of the track onto the planked way of the street. Those coming from the opposite direction must be let out on the other side, and for their accommodation and for the accommodation of those desiring to take cars going in that direction, the appellant constructed a platform, some five feet wide, extending south on 28th avenue southwest, from its junction with Andover street, for a distance of thirty feet.

On the evening of April 29, 1912, the respondents, with some eight others, took passage on one of the appellant's cars at points south of the junction of the streets named, their designation being such junction. When the car reached the junction, it stopped at its usual stopping place to the right of the platform mentioned, and the party alighted from the rear exit onto the planked roadway to the right of the car and on its opposite side from the platform. The party immediately passed to the rear of the car, crossed the car tracks, stepped upon the platform, and proceeded to walk north thereon towards Andover street. While they were passing over the platform, the car started forward on its way, and in making the turn onto Andover street, the rear end of the car swung over the platform some three feet, striking the respondent Pearl Gannaway, causing the injuries for which this

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action is prosecuted. A recovery was had in the court below, and this appeal is taken therefrom.

At the close of the case, the foregoing facts appearing, the appellant challenged the sufficiency of the evidence to justify a recovery, and in this court assigns error on the refusal of the court to sustain the challenge.

The challenge should have been sustained. The respondents had ceased to be passengers on the car when the accident happened, and the appellant owed them no greater duty to look out for their personal safety than it owed to persons passing along the street generally. It is not a duty of street car companies to warn pedestrians on the streets that there is an overhang to an ordinary street car when it rounds a curve. This is a matter of common knowledge, and ordinary prudence requires that every one take notice of the fact.

But it is claimed that the circumstances shown here makes a case different from that of an ordinary case where a pedestrian on the street is struck by the overhang of a street car. It is said that the conductor knew, or ought to have known, the direction the respondents had taken on leaving the car, and that they were upon the platform and liable to be injured when he directed the motorman to proceed onward with the car. But there is nothing in the evidence to justify this conclusion. The accident happened at about eight o'clock in the evening, and although there was an electric arc light at the junction of the streets, the car inside was more brilliantly lighted than the space surrounding it. This would prevent the conductor inside of the car from seeing anything on the outside, even had he attempted to look, but he owed the respondents no duty to look. He had performed his full duty when he saw that they were safely alighted on the street out of the way of harm from the car. If, after being thus put in a place of safety, they deliberately walked into a place the dangers of which they knew as well as the conductor knew, he cannot be blamed because he did not follow them and warn them. Of course, if he actually saw or discovered that they

were in a perilous position in time to prevent an injury by waiting until they had left the platform, or by stopping the car after it had been directed to start, a different question would be presented, but nothing of this kind appears in the record.

The judgment is reversed, and the case remanded with instructions to dismiss the action.

[No. 11400. Department Two. February 4, 1914.]

JOHN ENGSTROM, *Respondent*, v. EDENDALE LAND COMPANY,
Appellant.¹

EMINENT DOMAIN—PERSONS ENTITLED—Irrigation Company. An irrigation company entitled to cross the lands of another and divert part of the waters of a creek thereon, having abandoned the old right of way under a license to use another way, has the right to condemn a necessary right of way across such lands to the creek, upon revocation of the license.

EMINENT DOMAIN—RIGHTFUL POSSESSION—EJECTMENT—STAY TO PERMIT CONDEMNATION PROCEEDINGS. Upon ejectment to oust a common carrier of water from a right of way which it was using by permission, the suit is properly stayed for thirty days to allow the defendant to bring a condemnation suit to acquire the right of way.

SAME—STAY—DAMAGES. In such a case, it is error to assess the plaintiff's damages for the trespass at \$50, to be paid at once, irrespective of the damages to be ascertained in the condemnation proceedings, which will cover all damages.

Appeal from a judgment of the superior court for Stevens county, Myers, J., entered January 11, 1913, upon findings in favor of the plaintiff, in an action of ejectment, tried to the court. Reversed.

Murphy & Grant, for appellant.

A. C. Shaw and *Osee W. Noble*, for respondent.

¹Reported in 138 Pac. 302.

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Opinion Per MOUNT, J.

MOUNT, J.—The plaintiff brought this action to eject the defendant from a strip of land one hundred thirty-seven and one-half feet long by six feet wide.

It is alleged in the complaint, in substance, that the defendant unlawfully entered upon the land and by force withholds the possession thereof from the plaintiff, and that the plaintiff has been damaged thereby in the sum of \$1,000.

The answer of the defendant denied that it had unlawfully entered upon the land, and alleged, as an affirmative defense, that it was rightfully entitled to the possession thereof by reason of a contract entered into between the plaintiff and the defendant whereby the plaintiff agreed that, in consideration of the abandonment of another tract, the defendant should have possession of the tract in question. The defendant also alleged that it was engaged in supplying water to a large tract of land, and had been so engaged for many years; that it was entitled to the prior use by appropriation of the waters of Stranger creek; that this strip of land was necessary to be taken for an irrigating ditch, and prayed the court to fix a time when the value of the land taken, together with damages to the land not taken, should be assessed by a jury and the land appropriated for a right of way for an irrigation ditch. The reply generally denied these allegations.

Upon the trial of the case to the court without a jury, the court made findings in favor of the plaintiff, and entered a judgment to the effect that the plaintiff was entitled to the property in question unless, within thirty days from the date of the entry of the judgment, the defendant should sink beneath the surface of the soil at least one foot its flume now located over and upon the premises, and that the plaintiff have judgment for \$50 damages; that, in the event the defendant failed to sink its flume beneath the surface, as above stated, that a writ of restitution should issue placing the plaintiff in possession of the premises. The court also adjudged that the rights of the defendant in and

to the waters of Stranger creek were inferior and subject to the rights of the plaintiff therein; that the only right which the defendant has in and to the waters of Stranger creek is the right granted by the plaintiff to construct a flume and connect with the waters of the creek. The defendant has appealed from that judgment.

The facts in the case are substantially as follows: The plaintiff is the owner of the land in question. The defendant is a corporation engaged in irrigating certain lands adjoining the land of the plaintiff. Stranger creek is upon the land of the plaintiff. For many years, the waters of Stranger creek have been used by the defendant and its predecessors in interest for irrigation purposes. The waters from Stranger creek have been diverted across the land of the plaintiff.

A short time prior to the beginning of this action, the plaintiff and the defendant agreed orally that the defendant might change the course of the ditch across the plaintiff's land and abandon the old ditch. The plaintiff testified that the agreement was that the defendant should sink its ditch or flume one foot beneath the surface of the soil. The defendant testified that it was agreed that the top of the flume should be level with the surface of the soil. The old ditch, when the new one was completed, was to be abandoned. The defendant went upon the land upon the line of the proposed new ditch and constructed a ditch partially beneath the surface and partially above the surface. In some places it consisted of a flume three feet above the surface. When the plaintiff discovered this fact, he notified the defendant to remove therefrom. This the defendant refused to do. The president of the defendant company testified that, when he observed that his employees had constructed a flume above the surface of the ground, he directed that it be torn down and reconstructed level with the surface of the ground; that, while this work was in progress, the plaintiff ordered the defendant to vacate the premises, which the defendant refused to do. Thereupon

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this action was brought in the nature of an ejectment, and judgment was entered as above stated.

A reading of the record convinces us that there is no justification for the conclusion of the court to the effect that the respondent has a prior right to the waters of Stranger creek. If this issue was material to the case, it was only material to show some right in the appellant to take or use the respondent's land. There is no dispute of the fact that the appellant and its predecessors, for more than twenty years, have taken the waters of Stranger creek and carried the same across the land of the respondent for irrigation purposes. The appellant has probably not used all the waters of that creek, but it has used a part of the waters, and has carried the same across the land of the respondent without objection, in the old race or flume. This right of the appellant is, by the record, shown to be prior and paramount to that of the respondent. We find no substantial evidence in the record to justify the conclusion of the court to the effect that the respondent's right is prior or superior to that of the appellant. The court was, therefore, clearly in error in so finding.

We may concede, for the purposes of this case, that the right of the appellant upon the strip of land now in question was a mere license, revocable at the will of the respondent, and that the oral agreement was as stated by the respondent. The evidence is conclusive of the fact that the appellant is engaged in irrigating arid lands. It has been so engaged for several years. The right of the appellant to use the land of the respondent at the old ditch is not questioned. Nor is the right of the appellant to a part of the waters of Stranger creek questioned. It therefore has the right to condemn a more useful way across the land of the respondent. *Prescott Irr. Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635; *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36.

It is conceded in the record that the appellant went upon

the new right of way across the land of the respondent by permission of the respondent. Afterwards, when the appellant was not constructing the ditch according to the agreement as testified to by the respondent, he became dissatisfied and ordered the appellant from the premises, and brought this action in the nature of ejectment. The appellant, being a common carrier of water and engaged in supplying water for irrigation, and it being reasonably necessary that it use this new right of way for purposes of irrigation, clearly had the right to condemn the land of the respondent therefor, even though its right to be upon this particular strip of land had been terminated by the respondent. For purposes of condemnation, the court was clearly right when it made the order staying the right of the respondent to eject the appellant for thirty days in order that a condemnation proceeding might be brought. *Hathaway v. Yakima Water, L. & P. Co.*, 14 Wash. 469, 44 Pac. 896, 58 Am. St. 847; *Kakeldy v. Columbia & Puget Sound R. Co.*, 37 Wash. 675, 80 Pac. 205; *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062.

The trial court assessed the respondent's damages at \$50, to be paid at once. It is plain that, if the appellant shall condemn and appropriate the right of way, all damages will be recovered in that proceeding. It was, therefore, error for the trial court at this time to assess damages in the sum of \$50, or in any other sum, to be paid irrespective of the condemnation proceeding which the court authorized to be thereafter brought.

The judgment of the trial court must, therefore, be reversed upon the damages allowed, and upon the adjudication of the prior right of the respondent in and to the waters of Stranger creek. The cause is remanded, with leave to the appellant, within thirty days after the filing of the remittitur in the superior court, to bring an action to condemn the new right of way across the respondent's land. If such action is not brought, then, at the expiration of that time, a judg-

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ment may be entered in ejectment and for \$50 damages. The appellant will recover its costs in this court.

Crow, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11456. Department One. February 4, 1914.]

ALICE V. ROBINSON, *Appellant*, v. EDWARD ROBINSON,
Respondent.¹

DIVORCE—VACATION OF DECREE—COLLUSIVE SUIT—PETITION FOR VACATION—SUFFICIENCY. A decree of divorce will not be vacated at the suit of the successful plaintiff, for fraud in obtaining it, and her petition is demurrable for want of sufficient facts, where the gist of the petition was that her husband represented to her that the marriage embarrassed him financially and that he would get his business affairs adjusted and remarry her within six months, and otherwise he would be compelled to leave the state and he would give her no financial assistance, it being alleged that she was finally persuaded to bring the action, consenting to go before the court and tell the exact situation, which it appears she did not do, the inference from the allegations being that she testified falsely or suppressed material facts in the trial of the divorce case, resulting in findings sustaining the decree of divorce; since the petition shows nothing more than a collusive arrangement to obtain a divorce.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered July 10, 1913, dismissing an application to vacate a decree of divorce, upon sustaining a demurrer to the petition. Affirmed.

F. W. Girard and Robertson & Miller, for appellant.

Post, Avery & Higgins, for respondent.

Gose, J.—This is a petition to vacate a decree of divorce, entered at the suit of the petitioner. The decree was entered on the 16th day of April, 1912. Nearly ten months later, and on February 4, 1913, the petitioner, the plaintiff in the divorce suit, filed her petition to vacate the decree. A

¹Reported in 138 Pac. 288.

general demurrer to the petition was sustained. The petitioner has appealed.

The petition is too lengthy to be reproduced in full. It alleges, in substance, that the appellant was married to the respondent in October, 1900; that they lived together as husband and wife until the date of the entry of the decree, except during brief intervals when the respondent was away from his home, "through the inducement and solicitation of one Ethel Irving, with whom he became infatuated in the spring of 1910; that, in the month of May, 1911, the respondent, because of his infatuation for Ethel Irving, and at her instigation, brought an action against the appellant for a divorce on the ground of desertion, which he thereafter dismissed because there was no ground for his complaint; that, a short time thereafter, the respondent, who is a lawyer, commenced to urge and persuade the appellant to apply for and obtain a divorce from him on the ground of desertion, "in order that he might marry the said Ethel Irving;" that he told her that her refusal to comply with his request and secure a divorce "was occasioning him great inconvenience and annoyance in a business way, and he would be ruined financially as well as lose his standing with his friends, employers and business associates;" that he repeatedly told her that the application would be only a formal matter; that, as soon as the six months' limitation expired after she had secured the decree, "he would remarry her," and in the meantime would straighten up his business affairs; that they could then resume the marital relations; that she frequently inquired of him in what manner his marriage embarrassed him; that he always answered that he could not tell her, "and asked her if she could not believe him and trust him;" that the respondent often told her that, if she did not commence an action for and secure a divorce from him, he would be compelled to leave the state; that she would never hear from him again; that he would give no financial aid to her and to the children, but that, if she would get a divorce, his financial

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difficulties would soon be satisfactorily adjusted; that he told her that he would employ an attorney to represent her; that he would make default; and that he would make provision for the support of herself and their children until their remarriage. It is further alleged that, after the respondent had pleaded with the appellant for a number of months, "and after talking with one of his lawyers," who assured her that the respondent was greatly embarrassed in a financial way by reason of her refusal to apply for a divorce, and being overpersuaded, she finally consented to go before the court, "and tell the situation to the court just as it was, at the same time protesting that she did not want a divorce, that she had no grounds therefor; that she did not believe that a decree should be granted;" that she was advised by the respondent that, in order to get a divorce, "it would be necessary for her to go to the attorney whom he had selected and would pay, and have him present the matter for her;" that, pursuant to the "arrangement," she instituted an action for divorce; that the respondent defaulted, and that, on the 16th day of April, 1912, a decree of divorce was entered.

She further alleges, that the facts stated in her complaint and testified to at the trial did not justify a divorce on the ground of desertion; that, although she and the respondent sustained the marital relation subsequent to the bringing of the action, she did not testify to that fact; that the findings of the court in the divorce action, which are made a part of the petition, are not in accordance with the evidence adduced at the trial, and are not supported by the evidence; that, at the trial, she did not state that she wanted a divorce, but only stated "that she wanted to do what was best for the children;" that the trial court did not believe there was any ground for divorce, and continued the hearing until the afternoon; that the court was then not satisfied of the sufficiency of the evidence to warrant a decree; that he called counsel for the appellant and the prosecuting attorney to the bench, and the attorney for the appellant stated to

the court that he and the attorney for the respondent had been endeavoring for a number of months to bring about a reconciliation, but that they were unable to do so, and expressed the opinion that the appellant and the respondent could no longer live together as husband and wife; that, after this statement, the court granted the decree; that the statement made by counsel for the appellant "was not the fact;" that the appellant did not desire a divorce, but that she applied for it because of the solicitation of the respondent and because of the representations made by him and one of his attorneys; that she did not know, or have reason to believe, at such time "that a fraud was being practiced upon her or the court;" that she is informed and believes that the decree "was obtained by collusion;" that the respondent had a good defense to the action; that he had not in fact deserted her, but had, during the pendency of the suit, sustained the marriage relation with her, and was supporting her and the children.

In the divorce suit, the court expressly found that the respondent deserted the petitioner in the month of July, 1909, that he had since that time refused to live with her, and that during all of said time he had lived separate and apart from her, against her will, and without her consent. The divorce decree recites that the prosecuting attorney of Spokane county appeared on behalf of the state and resisted the action. The decree awarded to the appellant the custody of the four minor children, and directed the respondent to pay her the sum of \$200 per month, payable monthly, for the support and maintenance of herself and the minor children, until the further order of the court.

We think the demurrer was properly sustained. There is no allegation that the appellant was feeble in mind or body, or that she stated the real facts to her attorneys or to the court. In short, the petition shows nothing but a collusive arrangement for a divorce. She alleges that she finally consented to go before the court, "and tell the situation to the

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court just as it was." There is no allegation that she did this. Indeed the inference is either that the facts alleged in her petition are false, or that she testified falsely, or suppressed material facts in the trial of the divorce suit. The gist of her petition is that her husband, who had theretofore commenced a divorce suit against her on the ground of desertion, which he had dismissed, represented to her that the marriage embarrassed him in his business relations; that, while both of the parties knew there was no ground for divorce, he represented that, if she would obtain a divorce, he would get his business affairs adjusted within six months and remarry her.

The appellant relies upon *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135, and *McDonald v. McDonald*, 34 Wash. 293, 75 Pac. 865, from this jurisdiction, and *Danforth v. Danforth*, 105 Ill. 603, and *Winder v. Winder*, 86 Neb. 495, 125 N. W. 1095, from other jurisdictions. The case at bar has little in common with any of these cases. In the *Graham* case, a decree of divorce was entered at the suit of the husband on the first day of September, 1908. On the first day of October following the wife filed her petition, praying for an order vacating the decree and for permission to withdraw her answer and defend the suit. She alleged in her petition that, prior to November, 1907, the marriage relation had been most amicable; that from that time the husband began to grow cold and distant; that in June, 1908, he requested her to procure a divorce, which she refused to do; that his inattention and neglect then became more marked, until finally, with intent to deceive her as to his real motive, he more than once threatened to commit suicide unless she consented to allow him to procure a divorce; that he procured a revolver and made a pretended attempt to take his life; that his conduct so terrorized her and her children that she was reduced in health and so shocked in her nervous system that she was induced to believe that he would commit suicide, and yielded

to his demands; that she signed an answer which her husband had caused to be prepared; that her husband thereafter telephoned her that he would take his life if she resisted the divorce or appeared in the court room at the hearing; all of which she believed, and for that reason did not appear. She further alleged, that all the facts set forth in the complaint were false and untrue; that his threats of suicide were made with intent to cover his real purpose, which was to marry another, a purpose which he thereafter admitted to her. In holding that the petition was sufficient, the court said, that the complaint in the divorce suit was subject to demurrer; that the suit was in effect, notwithstanding the record, a decree by default; that, while ordinarily,

“the plea of coercion or duress would not be heard upon the facts alleged, when we consider the years of intimate relationship existing between these parties, the trust and confidence inspired by mutual interest in the rearing of children, it is not for us to say in this proceeding that the appellant was not the victim of a well founded dread that respondent, the father of her children, would take his life unless she submitted to his demand.”

In the *Pringle* case, the wife commenced an action in Mason county against the petitioner and obtained a decree of divorce upon constructive service. Returns were properly made that the husband could not be found in either Mason or Chehalis county. A trial was had, and a decree entered in which it was adjudged that the wife was entitled to a divorce. The husband alleged in his petition, that he had, at all times during the pendency of the action, resided in Chehalis county; that his place of residence and post office address were well known to his wife. This was held to state a ground for relief. It will be observed, however, that the petition was filed by the innocent party.

In the *McDonald* case, the court said, “It would seem to be violative of fundamental principles to hold that a divorce decree fraudulently procured may not be timely asserted by the *innocent* party to the proceedings.” The italics are

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ours. In the *Danforth* case, a motion was made to vacate a decree of divorce on the ground that it had been collusively entered. It was made at the term during which the decree was rendered. The court said, that the decree had not then become "an unalterable record;" that the decree "with the records of other proceedings of the term was still *in fieri*, and under the control of the court to amend, change or vacate as justice might require." *Winder v. Winder* is to the same effect. There the motion to vacate the decree because of collusion was made at the term at which the decree was entered. It was said, "the court had power to set aside the decree during the term, if satisfied that it had been obtained by fraud or collusion; or if it believed that its former conclusion was erroneous."

In *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. 1005, and *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431, we held that a decree of divorce stands upon the same footing as a decree in other cases. In the *Ferry* case, the wife was the defendant in the divorce action. The decree was granted to her upon her cross-complaint. She sought to have the decree vacated upon the ground, among others, that neither party to the divorce suit was a resident of the state at the time the decree was entered. She also alleged that no evidence was taken as to the residence of either party. A demurrer to her complaint was sustained. In passing upon the case, the court said, "We know of no rule prevailing in cases where the husband or wife alleges fraud of this kind different from that which controls cases between other classes of parties."

In *Karren v. Karren*, 25 Utah 87, 69 Pac. 465, 95 Am. St. 815, 60 L. R. A. 294, the wife sought to vacate a decree of divorce obtained at the suit of the husband. She alleged, *inter alia*, that her husband represented to her that he was procuring the divorce because of the insistence of his parents, and in order to get the homestead conveyed to him by his father, and that he represented that, after the divorce was

obtained, he would remarry her, and that, to enable him to procure the deed to the homestead, she refrained from appearing and defending the action. In denying the relief, the court said, "The plaintiff, when she gave her consent, must have known that the contemplated divorce could only be procured by a suppression of the facts and false testimony."

Nichols v. Nichols, 25 N. J. Eq. 60; *Newman v. Newman*, 27 Okl. 381, 112 Pac. 1007, and *Simons v. Simons*, 47 Mich. 253, 645, 10 N. W. 360, announce the same rule. In *Starbuck v. Starbuck*, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. 681, the court said:

"A party cannot avail himself of a defense or of a right to recover by means of an invalid decree or judgment obtained by him; but, on the other hand, he may not be heard to impeach a decree or judgment which he himself has procured to be entered in his own favor."

This is undoubtedly the general rule; there may be exceptions. If the petition, when read as an entirety, showed that the appellant was in fact acting under duress, she might be exempt from the rule stated, but no such fact appears.

The fact that perjured testimony may have been offered to secure the decree affords no ground for vacating it. *Whittley v. Whittley*, 60 Misc. Rep. 201, 111 N. Y. Supp. 1078; *United States v. Throckmorton*, 98 U. S. 61. In the *Throckmorton* case, it was said:

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

We think the petition, when fairly read, shows nothing more than a collusive arrangement to obtain the divorce. The prosecuting attorney appeared and resisted on behalf of the state. The petition does not allege that he failed to dis-

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charge his duty to the state. The legal presumption is that he did. There is no allegation that the appellant in the divorce action told the "situation to the court just as it was," as she alleges she had agreed with the respondent to do. Nor is there any allegation either that she did or that she did not make full disclosures to her counsel who represented her at the instance of the respondent. It is true she alleges that the evidence was not sufficient to justify the decree. That, however, was for the court. In what respect it was insufficient, she fails to point out. The presumption is that her counsel did their duty and there is no allegation to the contrary. The presumption is that the court did its duty and there is no allegation to the contrary, except the alleged insufficiency of the evidence. The insufficiency of the evidence would, in proper cases, justify an appeal, but it will not justify a vacation of the decree. *Morgan v. Williams*, ante p. 343, 137 Pac. 476.

We think the petition is fatally defective. The judgment is affirmed.

Crow, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11519. Department Two. February 4, 1914.]

GEORGE HAYES, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Appellant*.¹

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,000 will not be held excessive, where plaintiff, a painter, in a fall of over fifty feet into a river, sustained a rupture and an independent injury to the left side, problematical as to its character and duration.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered May 10, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action

¹Reported in 138 Pac. 269.

for personal injuries sustained by a painter in the fall of a scaffold. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

John Burton Keener, for respondent.

MORRIS, J.—On January 15, 1913, while respondent and four other painters were working on a scaffold suspended beneath a bridge over the Cowlitz river, engaged in painting the bridge, the scaffold broke, throwing three of the men, including the respondent, a distance of some fifty-four feet into the river. Two of the men were drowned. Respondent brings this action to recover damages for injuries sustained by him in the fall. He recovered a verdict for \$2,000, upon which judgment was entered, and the railway company appeals.

Two errors are urged; one, suggesting insufficiency of the evidence upon which appellant based motions for instructed verdict, for judgment notwithstanding the verdict, and for new trial; and the other, that the verdict is excessive.

The negligence alleged was that one of the the planks in the scaffold, and the one which broke precipitating the three men into the river, "was brittle, fragile, weak, and unsound," and that the foreman assembled too many men on the plank, making the weight too great for it to sustain. The scaffold was minutely described to the jury, together with the number of men ordered to work upon it by the foreman, and the positions in which the men stood, and what they were doing at the time the plank upon which the respondent and the three others were working broke. Without reciting the evidence from which it might be so held, we think it is sufficient to sustain a finding that the plank in question was too weak for the weight and strain it was subjected to.

Respondent's injury was a rupture or hernia. There was also evidence of an injury to the left side, problematical as

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to its character and duration, which was independent of the rupture. We cannot, under these circumstances, say the verdict is excessive.

The judgment is sustained.

Crow, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 11530. Department One. February 4, 1914.]

THE CITY OF CHEHALIS, *Respondent*, v. THE CITY OF
CENTRALIA, *Appellant*.¹

EMINENT DOMAIN—BY CITIES—PRIORITY. As between two cities seeking to condemn the same land, the one first in time is first in right.

EMINENT, DOMAIN—BY CITIES—PREREQUISITES—ORDINANCE—SUFFICIENCY. Under Rem. & Bal. Code, § 7769, providing that a city desiring to condemn land shall provide therefor by ordinance, an ordinance providing for the submission of a plan or intent to acquire a gravity water system, containing a recital that it is proposed to acquire the necessary lands by purchase or condemnation, and describing the location of a proposed dam and intake, sufficiently manifests an intent to condemn land, as against another city seeking to condemn the same land; since the statutes are to be strictly construed only as against the owners of the land, and the law does not require any formal direction to the city attorney to institute condemnation proceedings.

SAME—PROCEEDINGS—PETITION—DESCRIPTION OF PROPERTY. Under Rem. & Bal. Code, § 7771, requiring a reasonably accurate description, a petition in condemnation proceedings is not fatally defective in that the description of the property did not close, where it was sufficient to identify the property, and the same was properly described in the decree; accuracy only in the decree being essential.

SAME—PROCEEDINGS—DEFENSES. In condemnation proceedings for a city to acquire lands for a storage reservoir for a water system, it is no defense that, pending the trial, another city had acquired the rights of lower riparian owners, especially where it was not sought to condemn such riparian rights; since the acquisition of such rights did not confer the right to divert the waters for municipal purposes.

¹Reported in 138 Pac. 293.

Appeal from a judgment of the superior court for Lewis county, Back, J., entered May 7, 1913, upon findings in favor of the plaintiff, in a contest to determine the right to condemn property for a public use, after a hearing before the court. Affirmed.

W. N. Beal, Geo. Dysart, Forney & Ponder, and Preston & Thorgrimson, for appellant.

W. A. Reynolds, John A. Shackleford, and F. D. Oakley, for respondent.

CHADWICK, J.—The cities of Chehalis and of Centralia are alike contending for a site for a reservoir on the north fork of the Newaukum River. It is the intention of each of the cities to impound and divert the waters of that stream for domestic and other uses within the limits of the respective municipalities.

The city of Chehalis was the primal mover, and being first in time, was held to be first in right, under the following decisions of this court: *State ex rel. Cascade Public Service Corp. v. Superior Court*, 53 Wash. 321, 101 Pac. 1094; *State ex rel. Kettle Falls Power & Irr. Co. v. Superior Court*, 46 Wash. 500, 90 Pac. 650; *Nicomen Boom Co. v. North Shore Boom etc. Co.*, 40 Wash. 315, 82 Pac. 412. From a decree in favor of the city of Chehalis, the city of Centralia has appealed. The owner of the land sought to be condemned is the Weyerhauser Timber company. It is not complaining or appealing.

It is first contended that the proceedings undertaken by the city of Chehalis were insufficient and so lacking in certain formalities required by the statute that no rights can be predicated thereon, and that the proceedings undertaken on the part of Centralia being in all things regular, the court should have entered a decree in its favor.

The irregularities and omissions relied on are, first, that the city of Chehalis did not declare its intention to condemn by ordinance, as required by Rem. & Bal. Code, § 7769 (P. C.

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171 § 33); and, second, that the property sought to be acquired was not sufficiently described; and, third, that the city of Centralia having acquired by deed the riparian rights of the down stream owners, cannot now be deprived of the waters of the Newaukum river.

(1) That part of § 7769 of the code relied on is as follows:

“When the corporate authorities of any such city shall desire to condemn land or other property, or damage the same, for any purpose authorized by this act, such city shall provide therefor by ordinance, and unless such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, compensation therefor shall be made from any general funds of such city applicable thereto.”

It is admitted that the ordinance providing for the submission of the plan or intent to acquire a gravity water system contains a recital that it is proposed to acquire the necessary lands, either by purchase or condemnation, that it is proposed to construct the intake and dam at a point on the river within the limits of a certain quarter section of land; but it is urged that these recitals were for the purpose of advising the people as to the proposition to be voted on, and that the ordinance for this reason does not institute condemnation proceedings.

We do not read the statute with the same understanding as counsel. The city could not condemn by ordinance. Under the statute, that could only be done by a proper proceeding in a court of competent jurisdiction. Rem. & Bal. Code, § 7770 (P. C. 171 § 35). The statute requires, as an initial proceeding, that the council shall manifest its intent to condemn land. This was done in the instant case, and it was ratified by the electors of the city. As against a property owner, it is the rule that eminent domain statutes shall be construed strictly; but as between parties who are seeking priorities in the taking of the same piece of land, we know of no rule that would require a court to hold any part of the

proceeding to be technically insufficient unless it can be said that the objection goes to the jurisdiction.

It is said, that the will of the council, as evidenced by the ordinance, falls short of the demands of the statute; that this is proven by the fact that, after the ordinance was passed, the council passed a motion directing the city attorney to institute a condemnation proceeding in the courts; that, the first ordinance being insufficient, the direction to the attorney should have been by ordinance. This position is not tenable. The ordinance was sufficient. Nor does the law require any formal direction to the city attorney. If it did and he had begun such action without direction, no third person could object. It would have been a mere irregularity which, if not repudiated by the city, would have been unavailing to others.

(2) The petition did not describe the property sought to be taken with exact certitude; one of the courses did not tie. Upon the trial, a decree was entered defining the exact limits of the condemned area. The description was sufficient to identify the property. The statute, Rem. & Bal. Code, § 7771 (P. C. 171 § 37), requires no more than a reasonably accurate description. It follows that accuracy of description is essential only in the decree.

(3) The acquisition of the rights of the riparian owners, by the city of Centralia, pending the trial of the condemnation suit, is unavailing as a defense. *State ex rel. Kettle Falls Power & Irr. Co. v. Superior Court, supra*. Moreover, respondent disclaims in its brief any intention to hold these riparian rights under the decree, or to acquire them in this proceeding. We shall not discuss this phase of the case, except to say that this proceeding is directed to the acquisition of land upon the river upon which it is intended to make a storage reservoir. The city of Centralia could not acquire the right to divert the waters of the stream for municipal uses by acquiring the lower riparian rights. Its rights are those of riparian owners; no more and no less; and it may be that respondent will have to extinguish those rights before it

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can divert the waters of the stream. Such a proceeding would involve questions going to the extent of the impairment of the right not now before us, and which we do not decide.

Affirmed.

Crow, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11574. Department One. February 4, 1914.]

JENNIE LOWE, *Appellant*, v. P. J. O'BRIEN *et al.*,
Respondents.¹

LANDLORD AND TENANT—DEFECTIVE PREMISES—PROMISE TO REPAIR—LIABILITY OF LESSOR. Where the landlord has made a promise to repair known defects in the premises, the tenant is absolved from the assumption of risks therefrom while remaining for a reasonable time awaiting performance of the promise, if not guilty of contributory negligence.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered May 29, 1913, dismissing an action for breach of covenant to repair, on granting a nonsuit. Reversed.

Chas. D. King, for appellant.

Thos. M. Vance and *Harry L. Parr*, for respondents.

CHADWICK, J.—Plaintiff brought this action to recover damages for breach of covenant to repair the premises occupied by her as a tenant of the defendants. Plaintiff was a tenant from month to month. When the tenancy began in the year 1908, the property was not in good repair. The house needed papering. Defendant P. J. O'Brien said he could not fix it up, but would keep the property in repair. The house was built on piling over the water of Budds Inlet, but nothing was said about tide flats or foundation. Defendant, from time to time, made such repairs as seemed to be demanded. He put in several piles, repaired the chimney, and fixed the

¹Reported in 138 Pac. 295.

roof. The house was apparently insecure in the summer of 1912. Plaintiff asked defendant when he was going to fix the piling under the building, saying if defendant did not fix the house and make it safe she would have to move out. Defendant promised to have the work done soon. Defendant went east for a time. Plaintiff talked to him about repairs after he returned, and shortly thereafter the house fell into the bay. Upon this state of facts, and a showing of money damages, the trial judge entered a judgment of nonsuit.

The trial judge followed, in his judgment, the greater number of cases, and possibly what might be called the general rule, which is that a landlord who agrees to keep premises in repair and fails to do so is not liable in tort for damages to a tenant from month to month who has been a tenant for some time and has full knowledge of the facts.

Out of the conflict of authority, this court has held the contrary doctrine in the case of *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, where the court referred with approval to the case of *Stillwell v. South Louisville Land Co.*, 22 Ky. Law 785, 58 S. W. 696, 52 L. R. A. 325, holding that a landlord may be liable in tort for failure to repair an open defect known to both parties, on the ground that the landlord's promise to repair absolved the tenant from an assumption of risk.

The law is exhaustively treated in that opinion, and we feel bound to follow it. If a promise was made, plaintiff would, no doubt, be warranted in remaining in the house for a reasonable time, waiting performance. Whether she remained an unreasonable time and was guilty of contributory negligence, is a question of fact which may be raised on a new trial, if the pleadings are properly amended.

In fairness to the trial judge, it should be said that the *Mesher* case had not been decided when the judgment was entered in this case.

Reversed and remanded for a new trial.

CROW, C. J., ELLIS, GOSE, and MAIN, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 11707. Department One. February 4, 1914.]

O. R. THORBERG *et al.*, Respondents, v. THE CITY OF
HOQUIAM *et al.*, Appellants.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CHANGE OF GRADE—LIABILITY—EVIDENCE—SUFFICIENCY. A city establishes a grade, which it cannot thereafter change without paying for the consequential damages to abutting property, where by formal resolution and contract, it improved the street by clearing and grading it to its full width and building a plank road with sidewalks on both sides; the presumption being that a grade was adopted, a formal ordinance establishing a grade not being necessary.

SAME—IMPROVEMENTS—PERMANENCY. A plank roadway sixteen feet wide must be presumed to be a permanent and not a temporary improvement, where the work was done on the special assessment plan and the cost charged to property in the district, and where the intent to grade the street was clearly manifest.

SAME—IMPROVEMENTS—LIABILITY FOR CHANGE OF GRADE—REMEDIES OF OWNER—INJUNCTION—DAMAGES. Where property owners permitted a city to prosecute street improvement work until it was nearly completed, they cannot enjoin the work on the ground that they had not been paid damages by reason of a change of grade; their only remedy being recovery of the damages at law.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered July 9, 1913, upon findings in favor of the plaintiff, in an action for an injunction. Reversed.

James P. H. Callahan, Geo. D. Abel, and W. H. Abel, for appellants.

William E. Campbell, for respondents.

CHADWICK, J.—In the year 1905, the city council of the city of Hoquiam, by formal resolution, provided for the improvement of a portion of L street, in said city. The intention of the city council is evidenced by a formal resolution wherein it is said, *inter alia*:

¹Reported in 138 Pac. 304.

"It is the opinion of the said council that the said street should be improved by clearing, grading and removing obstructions from said street full width, and by building a plank roadway thereon, sixteen feet in width, and also by building sidewalks along both sides of said street, eight feet in width, according to the plans and specifications now on file in the office of the city clerk of said city."

A contract was let by the city, and in the specifications, we find the following:

"The street is to be cleared full width and down to the surface of the ground, of all trees, logs, stumps, roots, brush, and grass tussocks, which debris shall be burned; also all lumber in old sidewalks and in bridge over slough, near Fifth street, shall be similarly disposed of, provided that abutting property owners may have such lumber in consideration of their removing same from the street."

The improvement was made in accordance with the specifications, and the cost thereof assessed to the abutting property. About 3,500 feet of plank road, sixteen feet wide, and about 4,200 feet of sidewalk, was laid. Plaintiffs are the owners of one of the abutting lots, and have built a dwelling with reference to the existing street level, as improved in 1905. In November, 1912, plaintiffs and others petitioned for the improvement of L street. This the city undertook, adopting a plan which will require a raise in the grade of the street of about two or three feet above the natural level of the ground. The work had been substantially done, when these plaintiffs sued out a restraining order; and upon hearing the merits of the case, the court held that the city could not proceed until it had assessed the damages resulting to the property of the plaintiffs, and ordered the city to begin condemnation proceedings within twenty days, or remove the fill along the whole line of the street. The city has appealed.

The court held correctly when it was adjudged that the city had adopted a grade in 1905. Appellant contends that no proper grade having been established by ordinance when the 1905 improvement was made, the city may yet make an

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original grade without meeting the consequential damages, under the authority of *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859, and *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089. We are told that the trial judge followed the case of *Sargent v. Tacoma*, 10 Wash. 212, 38 Pac. 1048, where it is said:

"But we are satisfied that the establishment of street grades within the meaning of the act of 1883, prohibiting the changes of grades so as to render the raising or lowering of buildings necessary, without the pre-payment of damages (Gen. Stat. § 759), contemplated either a grade established by the actual improvement of a street to a grade, or the formal adoption of a grade by ordinance or resolution. There is good authority for the latter proposition. *Stewart v. City of Clinton*, 79 Mo. 603; *Mattingly v. City of Plymouth*, 100 Ind. 545; *Nebraska City v. Lampkin*, 6 Neb. 27."

See, also, *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341, 64 Am. St. 637, 35 L. R. A. 52; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118, 36 N. E. 821; *Aldrich v. Aldermen of Providence*, 12 R. I. 241. Appellant strenuously insists that this is dictum and should not be followed. It is possible that the *Sargent* case could have been decided without going so far, but that does not impair the worth of the proposition there laid down when it is wedded to relevant facts. That a city may, by its conduct, and without formal ordinance, adopt a grade to which it will be bound, is well settled. It is admitted in both the opinion and the dissenting opinion in the case of *Jones v. Gillis*, 75 Wash. 688, 135 Pac. 627, where apt authorities are collected.

It is further contended by the city, as in the *Jones* case, that the improvement, being a plank roadway but sixteen feet wide, was not a permanent improvement; that it was at best a temporary convenience to the property owners; that no grade stakes were set when the plank road was laid down, and no attempt was made to follow a level line except by sighting with the eye. Respondent meets this argument by

reference to the case of *Knickerbocker Co. v. Seattle*, 69 Wash. 336, 124 Pac. 920, where this court held that an elevated roadway resting upon mud sills, piles and stringers was a permanent improvement. It was there insisted that a structure of wood was but a temporary improvement, and was intended to serve as a roadway only until such time as an earth fill could be made. We are not inclined to adopt the reasoning of the *Knickerbocker* case to the extent of holding that a plank roadway laid upon an ungraded street in a city is a permanent improvement as a matter of law; but where a grade is formally established, as was done in the *Knickerbocker* case (and here by adoption or estoppel), we think there can be no doubt of the proposition that a city would not be warranted in improving the street under the statutes permitting the creation of an assessment district and charging the cost of the improvement to the abutting property without giving the work some character of finality or permanence. Or, to state the proposition in another way, if a city improves a street under the special assessment plan and charges the cost thereof to the abutting property, the law will presume the formal adoption of a grade as against a subsequent change of grade on the part of the city. If not within the letter, this ruling is clearly within the spirit of Rem. & Bal. Code, § 7875 (P. C. 77 § 1167). In this case, the intent of the council to grade the street in 1905 is clearly manifest. In the *Jones* case, this court found the improvements formerly made to be casual and temporary; that a formal grade had been adopted; that the property owner had notice of it and built in defiance of it. It is also true that the cost of such work as was done was paid for by the city of Walla Walla out of its general funds.

It should not be understood that we are holding that a city cannot make and maintain for an indefinite time a roadway over its streets at the cost of the city pending the building of a proper and permanent roadway upon an established grade. That question is not before us.

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Statement of Case.

Plaintiffs' only remedy in this case is to recover damages. They cannot enjoin the work. They permitted the city to begin and prosecute the work until near completion and must now seek their remedy at law. But recently we had occasion to consider the former decisions of this court and to lay down a rule upon this phase of the case:

"So it will be seen, where the petitioner is about to take possession without condemnation, injunction is a proper remedy; where there has been a taking and the public function is being exercised, the only remedy is to take compensation." *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820.

The case will be remanded with directions to the lower court to dissolve the injunction and to proceed at law to determine the damages sustained by the plaintiffs, if any.

CROW, C. J., GOSE, ELLIS, and MAIN, JJ., concur.

[No. 11712. Department One. February 4, 1914.]

STEPHEN A. GIBSON, *Respondent*, v. R. E. CLEARY *et al.*,
Appellants, MONTANA SCOTCH BONNETT COPPER &
GOLD MINING COMPANY *et al.*, *Defendants*.¹

APPEAL—DECISION—LAW OF CASE. A decision of the supreme court that a garnishment of corporate stock was void, and directing the lower court, upon citation to all persons interested, to vacate the judgment and set aside the sale, becomes the law of the case, and is conclusive in subsequent proceedings begun to make the mandate of the supreme court effective.

SAME—DECISION—LAW OF CASE—SUBSEQUENT DECISIONS. Where a decision of the supreme court has become the law of the case, it cannot be affected by a decision in another case, rendered some months later, overruling former decisions and changing the governing rule of law.

Appeal from a judgment of the superior court for Spokane county, Pendergast, J., entered January 3, 1913, upon

¹Reported in 138 Pac. 269.

findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for equitable relief. Affirmed.

Geo. W. Belt, and Codd, Hutchinson & Codd, for appellants.

R. L. Edmiston and A. M. Craven, for respondent.

MAIN, J.—The purpose of this action was to secure the cancellation of certain certificates of the shares of capital stock of a corporation.

The material facts are substantially as follows: On May 31, 1911, in an action for divorce, then pending in the superior court for Spokane county, wherein Stephen A. Gibson was plaintiff and Marie Gibson was defendant, a judgment was entered by which the defendant was awarded an attorney's fee of \$500, and costs of \$198, as against the plaintiff. On August 7, 1911, the defendant appealed from that judgment, so far as it was adverse to her, and superseded the judgment by a bond given for that purpose. On August 17, 1911, the plaintiff filed a cross-appeal from the judgment. No supersedeas bond was given by him.

On September 11, 1911, the defendant instituted garnishment proceedings, based upon the judgment in her favor for \$698. A writ was issued and served upon the Montana Scotch Bonnett Copper & Gold Mining Company, a corporation. The mining company answered that, upon its books, 294,000 shares of its capital stock stood in the name of Stephen A. Gibson.

On September 22, 1911, the court entered an order directing the sheriff to sell so much of the mining stock as might be necessary to satisfy the judgment. On October 9, 1911, the 294,000 shares of stock were sold by the sheriff.

The plaintiff, Stephen A. Gibson, had no notice or knowledge of the garnishment proceeding until subsequent to the sale of the stock. After learning of the sale, he proceeded by certiorari to review the action of the superior court in the

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garnishment proceeding; and in *State ex rel. Gibson v. Superior Court*, 69 Wash. 280, 124 Pac. 686, this court held that "the garnishment proceedings were, therefore, void from the beginning," and directed that the case be remanded with direction to the superior court to vacate the judgment in the garnishment proceeding, set aside the sale of the stock, and take the necessary steps to reinvest the relator, Stephen A. Gibson, with the title thereto. This decision was rendered on July 9, 1912.

Thereafter, an independent action was begun for the purpose of making effective the mandate of this court. Issues were joined, and the case came on for trial on the 12th day of December, 1912. On January 3, 1913, a judgment was entered cancelling the transfer of the stock in the garnishment proceeding, and directing that the name of Stephen A. Gibson be reinstated upon the books of the mining company as the owner thereof. From this judgment, the present appeal is prosecuted.

It seems to us that the law of the case was determined in *State ex rel. Gibson v. Superior Court, supra*. The judgment entered in the present case was in exact accord with the directions given in the opinion in that case. It was there said.

"The cause is remanded, with directions to the lower court, upon citation to all persons interested, to vacate the judgment in the garnishment proceedings, set aside the sale of the stock, and take the necessary steps to reinvest the relator here with the title thereto, upon the books of the company."

It is argued, however, that since this court, upon the rehearing in the case of *Griffith v. Griffith*, 71 Wash. 56, 127 Pac. 585, 128 Pac. 636, reversed its former ruling and held that, in a divorce case, this court could not hear, pending an appeal, an original application for attorney's fees, suit money and alimony, it follows that a supersedeas bond is necessary in order to stay execution or other proceedings upon a judgment in a divorce case pending appeal. Conceding, for

the purpose of this decision only, but not deciding, that such is the effect of that decision, it would not revitalize the garnishment proceeding here in question, which was formerly held void. The decision in *State ex rel. Gibson v. Superior Court, supra*, became the law of the case. It was rendered some months prior to the decision in *Griffith v. Griffith, supra*. The decision in the latter case could not have the effect of modifying rights which had been fixed by a previous decision in another case.

The judgment will be affirmed.

CROW, C. J., CHADWICK, ELLIS, and GOSE, JJ., concur.

[No. 10924. Department Two. February 6, 1914.]

WASHINGTON FIRE INSURANCE COMPANY *et al.*, *Appellants*,
v. MAPLE VALLEY LUMBER COMPANY *et al.*, *Respondents*.¹

USURY—ACTIONS—EVIDENCE—SUFFICIENCY—BONUS OR PROFITS ON RESALE. Under the rule that the burden of proving the defense of usury is upon the party alleging it and that it is necessary to establish an unlawful intent, the defense of usury, in an action to foreclose a mortgage for \$25,000, is not established where it appears that the defendant was desirous of purchasing certain timber at \$105,000, the owner's selling price, but was unable to raise any money, when it interested the plaintiff's president in the matter, who secured the loan of \$25,000 from the plaintiff to enable the defendant to handle the matter, under an agreement that he would purchase the timber and resell it to the defendant at an advance of \$20,000, represented by four notes for \$5,000 each, which were to be paid without interest as the timber was cut, and which sum was conceded to him as his profit in the transaction, although, in consummating the deal, the deed to the timber was made direct to the defendants in order that deferred payments on the purchase price would not appear as liabilities of the plaintiff or its president; the testimony as to the final consummation of the deal indicating that the notes were intended as a profit on the resale and not as a commission or bonus for securing the \$25,000 loan.

¹Reported in 138 Pac. 553.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered July 11, 1912, upon findings in favor of the defendants, upon an issue as to usury, in an action to foreclose a mortgage. Reversed.

Hughes, McMicken, Dovell & Ramsey, for appellants Fireman's Fund Insurance Company *et al.*

Alexander & Bundy, for appellant Washington Fire Insurance Company.

John W. Roberts (Million & Houser and Paul W. Houser, of counsel), for respondents O. B. Woolley, Trustee, *et al.*

Scott Calhoun, for respondent Union Machinery & Supply Company.

MAIN, J.—The purpose of this action was to foreclose a mortgage. The original parties were Washington Fire Insurance Company, a corporation, plaintiff, and Maple Valley Lumber Company, a corporation, Union Machinery & Supply Company, a corporation, J. F. Smith, and M. B. Keeney, defendants. After the action had been begun, the Maple Valley Lumber Company was adjudged a bankrupt in the United States District court. One O. B. Woolley was elected trustee in bankruptcy, and as such trustee became a party to this action by intervention. The Fireman's Fund Insurance Company, a corporation, the Washington Trust and Savings Bank, a corporation, and W. H. Williams, also intervened.

The parties to this appeal, by stipulation, have provided that the appeal of the Union Machinery & Supply Company may be dismissed, and the judgment as to it affirmed. M. B. Keeney and W. H. Williams did not prosecute an appeal. All the other parties have appealed as against the judgment entered in so far as it was adverse to their respective contentions.

The record is voluminous, and an attempt will only be

made to epitomize the facts so far as it may appear necessary for the understanding and decision of the questions presented. Taking about July 1, 1910, as the starting point, for some years prior to this time one D. Dierssen had been the owner of a large tract of timber land, on the east side of Lake Washington. At this time, the Maple Valley Lumber Company owned and operated a saw mill on the west side of the same body of water. For a period of three or four years, the lumber company, through its president, J. F. Smith, had from time to time negotiated with Dierssen for the purchase of the whole or a part of the tract of timber. On March 15, 1910, the lumber company made a proposition to purchase all the merchantable timber at three dollars per thousand stumpage. This proposition was declined by the owner of the timber, and further negotiations between them seem to have been abandoned.

Sometime during the month of July, one T. M. Tennent secured from Dierssen a ten day option upon the land and timber for the sum of \$500,000. Shortly thereafter, Tennent and Dierssen approached Henry Carstens, who was the president of the Washington Fire Insurance Company and the owner of practically the entire capital stock of Carstens & Earles, Incorporated, with a view of interesting him in the purchase of the property. During this interview, it was made plain that Carstens would not be interested in anything other than the timber. Dierssen at this time made to him a price upon the timber only of \$105,000.

Within a very few days thereafter, J. F. Smith was brought to Carstens' office by Tennent. At this time, Tennent stated that the timber which was subsequently the subject-matter of the contract had been cruised under his direction, and the total amount of merchantable timber was from 40 to 50 million feet; and also stated that he had offered Dierssen the sum of three dollars per thousand for the timber, and that he would be willing to pay a lump sum therefor of \$125,000 or \$130,000, providing he could borrow sufficient money

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to meet certain of his pending obligations, and also enable him to open up the timber for logging.

From this time forward, Smith was repeatedly in Carstens' office discussing various propositions as to the handling of the timber, one of which, a proposed bond issue, was never consummated. Dierssen at various times sought out Carstens in an effort to dispose of the timber to him. Carstens stated to Dierssen on one occasion that he was not then prepared to purchase the timber, but that, if he subsequently determined to do so, they could do business upon the terms proposed.

The discussions between Carstens and Smith, on the one hand, and Carstens and Dierssen, on the other, continued until about November 1, 1910, at which time Carstens told Smith to go direct to Dierssen and contract for the timber. The contract was drawn on November 9th and executed on the 12th, in which the contract price of the timber was fixed at \$105,000. At the time Smith was directed to purchase the timber direct, he stated to Carstens that he understood that Carstens was to purchase the timber himself, and then resell it to him (Smith). Carstens stated that he preferred the transaction to be between Smith or the Maple Valley Lumber Company and Dierssen direct; the reason for this being that he did not desire that the deferred payments should appear as a liability of himself or his company.

During the month of July or August, while the negotiations were pending, Carstens loaned to the lumber company some four or five thousand dollars. When it was determined to take over the timber, Carstens informed Smith that the Washington Fire Insurance Company would make a loan of \$25,000 to the lumber company, secured by mortgage upon the property of the company. Abstracts were thereupon gotten out, and the title approved to the property offered as security. On November 16, 1910, Smith, and Brown, the secretary of the lumber company, came to Carstens' office and the transactions were there completed. The Maple Val-

ley Lumber Company and J. F. Smith executed to the Washington Fire Insurance Company their twenty-five promissory notes for \$1,000 each, bearing interest at the rate of seven per cent per annum, and the Maple Valley Lumber Company also executed a real estate and chattel mortgage securing the notes. At the same time, the Maple Valley Lumber Company executed four promissory notes for \$5,000 each to Henry Carstens, each of which except the first bore interest at six per cent per annum, payable on or before one, two, three, and four years after date, respectively. At this time, a written contract was entered into between the Maple Valley Lumber Company and Henry Carstens, setting forth the agreement or understanding between the parties relative to the transaction. This agreement was as follows:

"This contract recites that Henry Carstens having had an option or understanding with one Dierssen under which Dierssen was willing to accept \$105,000 for a certain parcel of timber known as the 'Dierssen Timber' near Renton in King county, Washington:

"We, the Maple Valley Lumber Company, a corporation under the laws of Washington, having desired and attempted to purchase the same timber from Dierssen for the sum of \$130,000; but having been unable so to do without financial assistance,

"Said Henry Carstens at our request intervened and by negotiating for us a loan enabled us to acquire the said timber at the price we were willing to pay for the same, namely, \$130,000,

"Now, we, the Maple Valley Lumber Company, freely admit a profit to Henry Carstens in this transaction of \$20,000, fully justified by the valuable service rendered; and have this day executed to Henry Carstens our four promissory notes, bearing even date herewith, with interest at six per cent, except the first such note which bears no interest, each one of these notes being for \$5,000, payable, the first, one year from this date and the remaining three notes at intervals of one year each.

"And to secure these notes we hereby stipulate, contract and agree that as we log the Dierssen timber we shall and will for every thousand feet of timber cut pay upon these

notes the sum of fifty cents; doing so monthly and furnishing to Henry Carstens monthly true and correct scale bills of the amount of logs cut by us, together with such other or further evidence of this kind as he, Henry Carstens, may require; but

"Regardless of the amount of timber so cut, the full amount of these notes, namely, \$20,000, is the measure of our indebtedness to Henry Carstens, and nothing herein shall be construed as indicating or evidencing that these timber payments shall be the sole or only security for the said notes or anyway prevent or limit the collection of the same according to the terms of the notes themselves.

"It is voluntarily stipulated by Henry Carstens that if the entire series of notes be paid in full on or before two years from this date no interest upon any of the notes shall be charged against or be collected from the Maple Valley Lumber Company.

"This contract privileges and binds the legal heirs, executors or assigns of both parties hereto.

"Dated at Seattle this 16th day of November, 1910."

On November 30th, Carstens indorsed the four \$5,000 notes, without recourse, and delivered them to the Washington Fire Insurance Company. Some two or three months subsequent to this, a portion of the lumber company's mill was destroyed by fire, and soon the company became financially embarrassed and, as already indicated, it became involved in bankruptcy proceedings in the Federal court.

The present action was begun on or about the 20th day of April, 1911, for the purpose of foreclosing the \$25,000 mortgage. After issue had been joined between the various parties, the cause was tried to the court without a jury. Stated briefly, the trial court adjudged: First, that the transaction was an usurious one; second, that, inasmuch as three of the \$5,000 notes were not then due, they could not be offset against the amount of the recovery; and third, that the Fireman's Fund Insurance Company was not a holder in due course.

The trial court made no findings of fact. Indeed, at the end of the judgment, it was provided that "none of the re-

citals in this decree are to be construed as findings of fact." The recitals in the judgment supported the claim of usury, but the court apparently refused to permit this to stand as an affirmative finding to that effect. From this judgment, the appeals are prosecuted.

The primary question is, whether the transaction between Carstens and J. F. Smith representing the Maple Valley Lumber Company, was subject to the taint of usury.

Rem. & Bal. Code, § 6251 (P. C. 263 § 9), provides, that no person shall directly or indirectly take or receive any greater interest than twelve per cent per annum for the loan or forbearance of any money, goods or thing in action. Section 6255 (P. C. 263 § 13) specifies the penalty that shall be imposed where an action is brought upon a contract and the proof establishes a greater rate of interest has been charged than that provided for in the preceding section.

The respondent, Maple Valley Lumber Company, by affirmative defense, charged that the transaction was usurious. Where the defense of usury is relied upon, the burden of proving the usurious character of the transaction is upon the party alleging it. 29 Am. & Eng. Ency. Law (2d ed.), p. 541. In determining whether the particular transaction is usurious, courts will disregard the form and look to the substance of the transaction. 39 Cyc. 918; *Cooper v. Nock*, 27 Ill. 301; *Lukens v. Hazlett*, 37 Minn. 441, 35 N. W. 265; *Clemens v. Crane*, 234 Ill. 215, 84 N. E. 884.

One of the requisites necessary to establish usury is an unlawful intent, that is, that there was an intent to do those things forbidden by the statute. It is not necessary that there be an intent to violate the usury statute as such. The law presumes the necessary unlawful intent from the mere fact of intentionally doing what is forbidden by the statute. 39 Cyc. 919.

In *Clarke v. Sheehan*, 47 N. Y. 188, it is said:

"Usury consists of a corrupt agreement, whereby more than lawful interest is to be paid; and all shifts and devices which may be resorted to, for the purpose of covering up or

concealing such an agreement, are ineffectual, if the intent to obtain more than legal interest for the use of the money can be discovered. And even a mistake of law will not protect the lender. (2 Cow., 678). But, where no such intent exists, refined theories should not be resorted to, for the purpose of making out usury by construction."

In the present case, then, disregarding the form and looking to the substance of the transaction, if it were the intention that Carstens should purchase the timber from Dierssen and resell it at an advance of \$20,000, making the selling price to the Maple Valley Lumber Company \$125,000, then the transaction is not subject to the taint of usury. But if the fact be that the four \$5,000 notes were intended as a commission or bonus on account of the \$25,000 loan, the charge of usury must be sustained. The parties to the transaction, at the time of its consummation and apparently before there was any thought of difficulty arising out of it, executed the document referred to in the statement. That contract contains the following:

"Henry Carstens having had an option or understanding with one Dierssen under which Dierssen was willing to accept \$105,000 for a certain parcel of timber known as the 'Dierssen timber' near Renton in King county, Washington,

"We, the Maple Valley Lumber Company, a corporation under the laws of Washington, having desired and attempted to purchase the same timber from Dierssen for the sum of \$130,000; but having been unable so to do without financial assistance,

"Said Henry Carstens at our request intervened and by negotiating for us a loan enabled us to acquire the said timber at the price we were willing to pay for the same, namely, \$130,000,

"Now, we, the Maple Valley Lumber Company, freely admit a profit to Henry Carstens in this transaction of \$20,000, fully justified by the valuable service rendered; . . ."

The following is an excerpt from the testimony of Dierssen and bears upon the character of the transaction:

"Q. When Carstens said to you that your price was satisfactory and that he would deal with you when he got ready,

was that the last negotiation you had with him? A. Yes, sir, he took my address and he says, 'I will let you know when I am ready, when times are better so I can make a turn.' He was willing to take my proposition, he was going to sell it to whoever he saw fit. Q. He was to get his compensation for the sale over the \$105,000? A. Yes, that had nothing to do with me, I didn't care what he got, if he bought, he had to buy to sell it or operate it."

As bearing upon the question whether Smith or the Maple Valley Lumber Company purchased the property from Carstens, the latter testified as follows:

"Q. Now, the latter part of October what occurred as between you and Mr. Smith or the Maple Valley Lumber Company? A. On one of his visits to me I asked Mr. Smith,—he urged me to bring the matter to some conclusion stating among other things that Mr. Dierssen would soon go to California and that if he was to get the timber he would need to act soon. I asked him 'what was the least amount of money you can get along with and get yourself in shape?' He says, 'Twenty-five thousand dollars.' I says, 'If I can get you twenty-five thousand dollars, do you think you can open up this timber and make a success of the thing in your opinion?' He thought he could. I said, 'You can buy this timber of me for \$125,000 and you can buy it at that figure and do well at it, can you?' He says, 'I will buy it and I can make \$100,000 in cutting it out.' My interest was largely in the direction of not having it understated."

As shown by the facts stated, Smith, up until the time that Carstens told him to go and deal directly with Dierssen, understood that the title to the property was to be acquired by Carstens, and in turn sold and conveyed to the Maple Valley Lumber Company.

Considering all the facts and circumstances of the case, and especially the contract which the parties solemnly executed when the transaction was closed, the testimony of Dierssen relative to his dealings with Carstens and the testimony of Carstens as to how he disposed of the property, seem to make it sufficiently obvious that there was an intent on the part of Carstens to purchase the property and resell

it, and that the four \$5,000 notes were given as a profit upon this transaction, and not as a commission or bonus for the \$25,000 loan. It is true that Dierssen testified that Carstens had nothing to do with the sale of the property to Smith. But Dierssen could not know of the negotiations between Carstens and Smith, he not having been present. It is also true that Smith testified that Carstens had nothing to do with the consummation of the sale between himself and the owner of the property. This witness also testified that the contract above referred to, which was executed by the Maple Valley Lumber Company, by him as president, and Brown as secretary, was called to his attention at the last moment, and he had no alternative but to sign. His testimony is weakened, however, by the fact that Brown, the secretary, testified that Smith, some two weeks before, had told him that such an agreement was to be made.

Upon the pivotal question as to the character of the transaction, the testimony of Carstens stands against that of Smith, because they alone testify concerning material matters which occurred during the negotiations between them. Considering the testimony of these two witnesses as it appears in the cold record, Carstens was the more candid and the less evasive. As already shown, the burden was upon the lumber company to prove the charge of usury, and we think it has failed to meet this burden. It seems highly improbable that Mr. Smith, a man who had been in the lumber business for years, would undertake to pay \$20,000 as a bonus or commission for the purpose of securing a loan of \$25,000. It also seems improbable that a man of Mr. Carstens' apparent sagacity and business ability would make a loan of \$25,000 and exact as a bonus or commission a sum which would make it impossible under the usury statute for him to recover the major portion of the principal loaned.

As sustaining the charge of usury, a number of the previous decisions of this court have been cited. A careful examination of all these cases discloses that none of them are

out of harmony with the views here expressed. The case of *Ridgway v. Davenport*, 37 Wash. 134, 79 Pac. 606, appears to be the decision most relied upon. In that case, the broker loaned the money of his principal and deducted a sum as commission which was in excess of the legal interest. It was held to constitute usury under the statute. In the present case, however, as already indicated, the four \$5,000 notes were not given as a bonus or commission, and therefore do not come within the case of *Ridgway v. Davenport*, *supra*. In the recent case of *Testera v. Richardson*, *ante* p. 377, 137 Pac. 998, after citing and distinguishing the *Ridgway* case, it was held that, where money was paid for the reasonable value of services rendered in connection with a loan, the sum so paid together with the interest would not constitute usury, even though the sum paid for the services and the interest charged in the note exceeded the statutory limit. It was there said:

"If the money paid by the appellants to J. W. Richardson could be held to be unreasonable or in the nature of a commission for making the loan, the case of *Ridgway v. Davenport*, *supra*, would control. But we are satisfied, and the court found, that the services were performed for the appellants and were reasonably worth the amount which the appellants agreed to and did pay, and the money paid was not for a commission."

While the facts of that case differ from those of the present, the principle which was there applied is the same as the one which supports the present holding; that is, that if a sum in excess of the statutory limit is paid as a commission or bonus for a loan, then the transaction is subject to the taint of usury; but if the sum so paid is for services rendered, or for profits earned upon a transaction other than the making of the loan, then the transaction is free from usury. There are a number of other questions discussed in the briefs, but what has already been said renders a consideration of these unnecessary.

The judgment will be reversed, and the cause remanded with direction to the superior court to enter a judgment of foreclosure for the amount of the \$25,000 loan, and interest thereon as specified, less all sums received as payment thereon. No costs will be allowed in this court.

Reversed.

CROW, C. J., ELLIS, FULLERTON, and MORRIS, JJ., con-
cur.

[No. 11442. Department One. December 26, 1913.]

W. C. CALHOUN, *Appellant*, v. JOSEPH METZGER *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered May 10, 1913, dismissing a habeas corpus proceeding, upon sustaining a demurrer to the petition. *Affirmed*.

H. J. Snively, for appellant.

The Attorney General and *John M. Wilson*, *Assistant*, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *Thorp v. Metzger*, ante p. 62, 137 Pac. 330. In fact, the executive warrant which was there considered provided for the arrest and extradition of the appellant herein, as well as the appellant in that case.

The judgment will be affirmed.

[No. 11381. Department One. January 6, 1914.]

F. H. SCHREIBER, *Appellant*, v. ADVANCE THRESHER COMPANY, *Respondent*.²

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered June 24, 1912, upon findings in favor of the defendant, in an action on contract, tried to the court. *Affirmed*.

Cornelius & Hooper, for appellant.

Herbert L. Kimball, for respondent.

PER CURIAM.—The Advance Thresher Company sold, through the Schreiber Implement Company, a threshing machine and engine to one Lee Corum. The Schreiber Implement Company was entitled to a commission of \$356.27, which was evidenced by commission certificates. These certificates provided that they should be paid out of the moneys to be collected from Corum. Corum held a piece of land under an executory contract of sale. He afterwards became insolvent and assigned his interest in the contract to the land to the Advance Thresher Company to secure the payment of the amount due it and the Schreiber Implement Company. The contract was

¹Reported in 137 Pac. 332.

²Reported in 137 Pac. 454.

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afterwards forfeited for nonpayment of interest. The Schreiber Implement Company assigned its claim to the plaintiff, who brings this action, alleging that it was agreed by the Advance Thresher Company, acting through its general agent, one Humphrey, that it would look after the interest of both parties, care for the land and meet the payments of principal and interest as they matured. The authority of the agent Humphrey is defined by a power of attorney which is in evidence. The court found that, if such promise were made, it was not binding upon the company for the reason that the agent had no power to guarantee any engagements that were collateral to the business carried on by the company; and further, that plaintiff had not proven by a preponderance of the evidence that the Advance Thresher Company had engaged itself to look after the land and the payments upon the contract; but, on the contrary, subsequent dealings with Corum, and with another to whom the land was rented after Corum had absconded, were carried on principally by the plaintiff in this action.

We deem it unnecessary to detail the evidence. It is sufficient to say that we have read the record and believe, with the trial judge, that the plaintiff has not sustained the burden of proof, but, on the contrary, the evidence preponderates upon the main issue in favor of the defendant.

Affirmed.

[No. 11262. *En Banc*. January 16, 1914.]

THE STATE OF WASHINGTON, on the Relation of Grant Smith & Company, Respondent, v. THE CITY OF SEATTLE, Appellant.¹

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 25, 1913, in favor of the relators, in mandamus proceedings to compel the levy of a supplemental local improvement assessment. Reversed.

James E. Bradford and Howard A. Hanson (James Kiefer, of counsel), for appellant.

Preston & Thorgrimson and Turner & Hartge, for respondents.

ON REHEARING.

PER CURIAM.—Upon a rehearing of this case by the court *En Banc*, the majority still adhere to the original opinion as found in 74 Wash. 438, 133 Pac. 1005, and for the reasons there given, are of the opinion that the judgment should be reversed.

¹Reported in 137 Pac. 819.

[No. 10921. *En Banc*. January 17, 1914.]JOSEPH JOHNS, as Receiver etc., Appellant, v. WILLIAM B. COFFEY
et al., Respondents.¹

Appeal from a judgment of the superior court for Pierce county, Card, J., entered October 28, 1912, upon findings in favor of the defendants, in an action on unpaid stock subscriptions. Affirmed.

Burkey, O'Brien & Burkey, for appellant.

B. S. Grosscup and W. C. Morrow, for respondents.

ON REHEARING.

PER CURIAM.—Upon a rehearing of this case by the court *En Banc*, the majority still adhere to the original opinion as found in 74 Wash. 189, 133 Pac. 4, and for the reasons there given, are of the opinion that the judgment should be affirmed.

[No. 11585. Department Two. January 31, 1914.]

THE STATE OF WASHINGTON, on the Relation of Thorwald Siegfried,
Plaintiff, v. THE SUPERIOR COURT FOR KING COUNTY et al.,
Respondents.²

Application filed in the supreme court September 30, 1913, for a writ of prohibition to the superior court for King county, Humphries, J., to compel the transfer of a cause to another judge. Writ issued.

Thorwald Siegfried, pro se.

H. E. Foster, for respondent.

PER CURIAM.—On September 13, 1913, H. E. Foster, as deputy prosecuting attorney in and for King county, filed in the superior court of said county an affidavit charging the relator, Thorwald Siegfried, with a constructive contempt, committed out of the presence of the court. The relator, being cited to appear before the respondent Honorable John E. Humphries, judge of the superior court, and answer the charge, at once and prior to further proceedings, moved the respondent to transfer the cause to another department of the court, or to call another judge to hear the charge.

¹Reported in 137 Pac. 808.

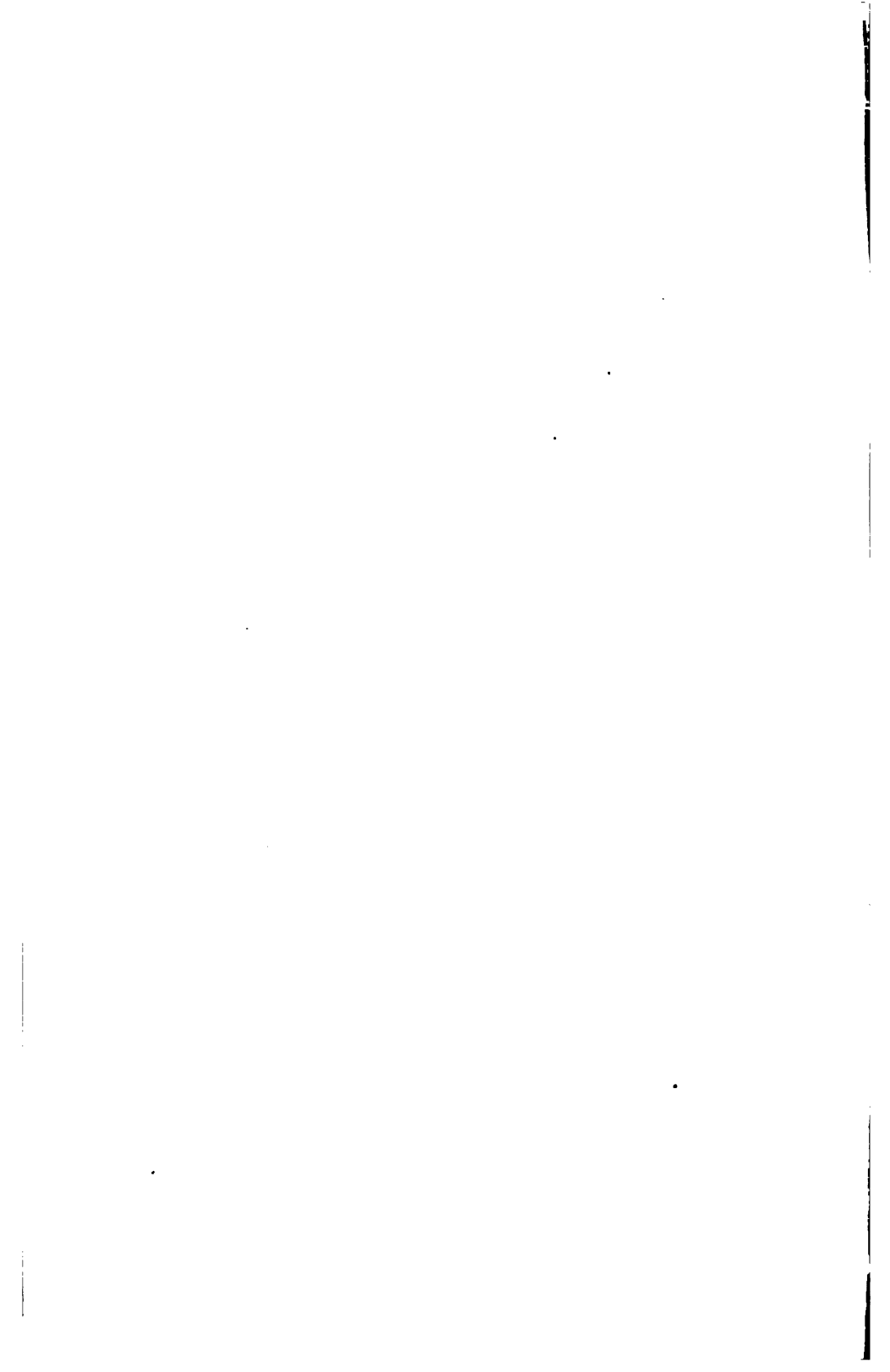
²Reported in 138 Pac. 293.

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or to apply to the governor to send another judge to hear the same. The motion, which was properly supported by affidavit of prejudice, was denied by respondent. Relator thereupon applied to this court for a writ to prohibit respondent from proceeding further in the cause, other than to grant the motion.

The record and proceedings herein are substantially the same as those in cause number 11617, *State ex rel. Russell v. Superior Court*, ante p. 631, 138 Pac. 291, in which an opinion has been filed on this date. For reasons therein set forth, it is ordered that a peremptory writ be issued.



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37. **APPEAL—DECISION—REVERSAL—ERROR OF LAW.** The reversal of a judgment against a sheriff for damages for a false return in a divorce case, on the ground that the plaintiff's evidence showed that she had mistaken her remedy, was for error of law, and not because the judgment was void. *Morgan v. Williams*..... 343
38. **APPEAL—DECISION—PARTIES NOT APPEALING—BENEFIT OF REVERSAL.** A sheriff, who failed to appeal from a judgment for damages for a false return, or to join in the appeal by his codefendant, the surety on his bond, cannot benefit from the reversal of the judgment on the surety's appeal, in view of Rem. & Bal. Code, § 1720, providing that parties not appealing or joining shall not derive any benefit from the appeal "unless from the necessity of the case;" the statute contemplating only an absolute necessity, in that no judgment would under any circumstances be valid as to one and not to the others. *Morgan v. Williams*..... 343
39. **APPEAL—DECISION—REMAND—PROCEEDINGS AFTER REMAND FROM UNITED STATES SUPREME COURT.** Where actions were dismissed, upon granting a nonsuit and sustaining a demurrer to the complaint, upon the single ground of the validity and constitutionality of a statute, and the judgments were affirmed on appeal without deciding any other question, the reversal of that decision by the Supreme Court of the United States, with remand for further proceedings not inconsistent therewith, does not preclude a new trial upon proffered defenses other than those passed upon on the appeals, where the decision of the Supreme Court of the United States did not pass on such defenses. *Ettor v. Tacoma*..... 267
40. **APPEAL—DECISION—REMAND—PROCEEDINGS BELOW.** Upon reversal of a case for error in the exclusion of evidence, it is the duty of the trial judge to receive and weigh the evidence, and render judgment

APPEAL AND ERROR—CONTINUED.

In accordance with his views of the law and the facts; and not to enter a judgment in accordance with the views he thinks the supreme court may take. *Cooper v. Farmers & Merchants' Bank of Wenatchee* 433

APPLIANCES:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 1, 2, 6.

APPLICATION:

For change of judges, see **VENUE**, 3.

APPOINTMENT:

Of guardian, see **INSANE PERSONS**.

APPORTIONMENT:

Of benefits from improvement, see **EMINENT DOMAIN**, 31.

Of assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 20-22.

APPRAISEMENT:

Of property sought to be condemned, see **EMINENT DOMAIN**, 15.

APPROPRIATION:

"General" act as part of appropriation bill, see **Congress**.

ARCHITECTS:

Authority to bind owner, see **PRINCIPAL AND AGENT**, 1.

ARGUMENT OF COUNSEL:

In criminal prosecutions, see **CRIMINAL LAW**, 4, 6.

ASSAULT:

By fellow passenger, see **CARRIERS**, 11, 13.

Admission of matters constituting *res gestae*, see **EVIDENCE**, 2.

On third person by servant, see **MASTER AND SERVANT**, 11.

ASSESSMENT:

Of benefits from improvement, see **EMINENT DOMAIN**, 19, 23-26, 31, 34.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 6-9, 11-13, 16-28.

Of tax, see **TAXATION**, 1-3.

ASSIGNMENTS:

1. **ASSIGNMENTS—CONTRACTS—PAYMENTS OR SECURITY—CONSTRUCTION.**
An assignment of a contract for the purchase of land valued at \$7,500, "as part consideration" and "as security for the performance" of the assignor's contract to purchase other lands from the assignee

ASSIGNMENTS—CONTINUED.

for \$10,000 was intended as security only, where the contract of purchase recited a consideration of but one dollar, and provided that the lands in the assigned contract might be sold for not less than \$7,500 and the proceeds applied on the purchase price. *Miller v. Moulton* 325

ASSUMPTION:

Of risks by tenant from known defects in premises, see **LANDLORD AND TENANT**, 3.

Of risk by employee, see **MASTER AND SERVANT**, 1, 6-9.

ATTORNEY AND CLIENT:

Argument and conduct of counsel at trial in criminal prosecutions, see **CRIMINAL LAW**, 4, 6.

Misconduct of counsel ground for new trial, see **NEW TRIAL**, 1.

AUTHORITY:

Of broker, see **BROKERS**, 1.

Of corporate officers or agents, see **CORPORATIONS**, 4.

To fix minimum wage on public work, see **MUNICIPAL CORPORATIONS**, 11.

Of city over annexed territory, see **MUNICIPAL CORPORATIONS**, 1.

Of agent, see **PRINCIPAL AND AGENT**, 1.

AUTOMOBILES:

Negligent use of on highway, see **HIGHWAYS**, 2.

AWARD:

Of homestead to children from separate property of deceased, see **HOMESTEAD**.

BAILMENT:

Embezzlement or larceny by bailee, see **EMBEZZLEMENT**.

BALLOTS:

On submission of ordinance to vote, see **MUNICIPAL CORPORATIONS**, 4.

BANKS AND BANKING:

1. **BANKS AND BANKING—REPRESENTATION—OFFICERS—ADVERSE INTERESTS—NOTICE.** Where the president and cashier of a bank extended credit to, and permitted overdrafts by, an insolvent corporation in which they were interested as stockholders with full knowledge of its affairs, in an action on their unpaid stock subscriptions for the benefit of the bank as principal creditor, it cannot be claimed that the bank was estopped by the knowledge of its president and cashier, who were adversely interested and who had failed to give notice of conditions to any of the other trustees or officers of the bank. *German-American State Bank v. Soap Lake Salts Remedy Co.*... 332

BANKS AND BANKING—CONTINUED.

2. **BANKS AND BANKING—DEPOSITS—CHECKS FOR COLLECTION—CREDITS—CONSIDERATION.** Where a bank received a check for collection, and made a credit thereon for accommodation only, there was no consideration for the credit, and the bank is entitled to charge off the credit, when the collection failed through no fault of the bank; and merely advising a customer that payment of the check could be stopped by wire does not charge the bank with the failure of the collection. *Belsheim v. First National Bank of White Salmon*.. 552

BAR:

By election of remedy, see **ELECTION OF REMEDIES**.

By judgment to make reassessment, see **MUNICIPAL CORPORATIONS**, 24.

BENEFITS:

Parties entitled to benefit from reversal of judgment, see **APPEAL AND ERROR**, 38.

To property from condemnation proceedings, see **EMINENT DOMAIN**, 19, 23-33.

Deduction of benefits from damages in condemnation proceedings, see **EMINENT DOMAIN**, 27-33.

To property from improvement, see **MUNICIPAL CORPORATIONS**, 13-23.

BEQUESTS:

See **WILLS**.

BIAS:

Change of venue for bias of judge, see **VENUE**.

BIDS:

On public work, see **MUNICIPAL CORPORATIONS**, 9.

BILL OF LADING:

See **CARRIERS**, 4.

BILLS:

Act as part of appropriation bill, effect, see **CONGRESS**.

BILLS AND NOTES:

See **USURY**, 2.

1. **BILLS AND NOTES—CONSIDERATION—FORBEARANCE—NEW NOTE FOR NOTE WITHOUT CONSIDERATION.** Since forbearance to sue, to constitute a valid consideration for a new promise, must be upon a "well founded claim," there is no consideration for a note given to prevent a present action upon an accommodation note given by defendant to plaintiff without consideration. *Nicholson v. Neary*..... 234
2. **BILLS AND NOTES—CONSIDERATION—PRESUMPTIONS—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY.** The *prima facie* presumption of

BILLS AND NOTES—CONTINUED.

a valuable consideration for every negotiable instrument, provided by Rem. & Bal. Code, § 3415, is not evidence, but a rule of law fixing the order of proof, and the presumption may be overcome, and the defendant may sustain the burden of proof, by the testimony of only one witness. *Nicholson v. Neary*..... 294

BLASTING:

Liability to third persons for acts of independent contractor, see **MASTER AND SERVANT, 12.**

BOUNDARIES:

1. **BOUNDARIES—NAVIGABLE STREAMS.** A deed according to recorded plats conveys the land only to the bank of the river, where the boundaries in the plat ran "to the right bank" of the river, and "thence up stream with the meanders" etc. *Newell v. Loeb*.... 182
2. **BOUNDARIES—STREAMS—MEANDER LINES—EVIDENCE—SUFFICIENCY.** Where the thread of a constantly changing stream was fixed as a boundary line at a certain date, the government meander lines, run many years before, do not control the boundary as against a subsequent survey and other evidence tending to show the location of the stream at the time it was fixed upon as the boundary line. *Sartori v. Denny-Renton Clay & Coal Co.*..... 166
3. **SAME—EVIDENCE—ACQUIESCENCE—AREA.** Where a line, acquiesced in for some time, gives the true area of adjoining tracts it is strong evidence of the true boundary line. *Sartori v. Denny-Renton Clay & Coal Co.* 166

BREACH:

Of laborer's contract to clear land, see **AGRICULTURE.**
 Of contract of carriage, see **CARRIERS, 5-9.**
 Of contract, see **CONTRACTS, 4-8.**
 Of contract, damages for, see **DAMAGES, 1-3.**
 Of contract to lease building, see **LANDLORD AND TENANT, 6-8.**
 Of warranty, see **SALES, 2.**
 Of contract for sale of land, see **VENDOR AND PURCHASER.**

BRIEFS:

On appeal, see **APPEAL AND ERROR, 12.**

BROKERS:

Liability of third persons for commissions of salesman employed by brokers, see **CONTRACTS, 2.**
 Agreement with for purchase of real estate, see **FRAUDS, STATUTE OF, 2.**

1. **BROKERS—AUTHORITY—FRAUD—LIABILITY OF PRINCIPAL.** A broker employed to conduct negotiations for the sale of real property upon

BROKERS—CONTINUED.

a commission has apparent authority to represent what was appurtenant to the realty, and the principal is liable in damages for his fraudulent representations relating thereto. *O'Daniel v. Streeby* 414

2. **BROKERS—FRAUD—EVIDENCE—ADMISSIBILITY.** In an action to recover from plaintiff's agent in the purchase of land the difference between the price actually paid by the agent and that which he represented as the cost, it is admissible to prove the customary commissions for purchasing lands for clients, where the plaintiff had offered to pay for the services, and defendant answered that he owed him nothing as he was to get his "commission" from the other side. *Stewart v. Preston*..... 559
3. **BROKERS—FRAUD—LIABILITY OF AGENT—DAMAGES—OFFSET.** An agent in the purchase of land, who was guilty of fraud in misrepresenting to his principal the amount paid for land, cannot offset against the damages the reasonable amount of his commissions which he had waived. *Stewart v. Preston*..... 559

BUILDING CONTRACTS:

See **CONTRACTS**, 8.

BURDEN OF PROOF:

To overcome presumption of valuable consideration, see **BILLS AND NOTES**, 2.

To show inability to pay alimony, see **DIVORCE**, 4.

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see **SALES; VENDOR AND PURCHASER**, 1, 2.

1. **CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD—EVIDENCE—SUFFICIENCY.** In an action to cancel a quitclaim deed, findings that the deed was procured by fraud of the grantee are sustained, where it appears that, in platting an addition, the grantor had unknowingly omitted a strip of land on the north side of his tract eighteen feet wide at one end and thirty-nine feet wide at the other, containing over an acre, through a mistake as to the true location of his line; and that, in consideration of \$20, he made the quitclaim of the strip to the adjoining owner on the north, in reliance on the representations of the grantee's agent that the strip was but three feet wide at one end and ran to a point at the other, and that the deed was wanted to settle a dispute with a third person with whom the grantee was then on the verge of litigation, which representations were all false, the grantee knowing the size of the strip and that the grantor was ignorant thereof and desiring to promote instead of settle the litigation; the representation that it was to settle the litigation being one of the moving considerations for the deed. *Chilberg v. Aiken*..... 249

CARRIERS:

Harmless error in instructions in action for assault by fellow passenger, see **APPEAL AND ERROR**, 27.

1. **CARRIERS—RATES—REGULATION—UNLAWFUL DISCRIMINATION—REASONABLENESS.** Under 3 Rem. & Bal. Code, § 8626-21, providing that no common carrier shall give any undue or unreasonable preference or advantage to any person or locality, a community is entitled to something more than mere reasonable rates, since the rates must be relatively equal to all shippers where there is no structural or operative difference favoring a haul from one point over a haul from another to the same shipping points. *Public Service Commission ex rel. Transportation Bureau of Tacoma Commercial Club v. Northern Pac. R. Co.*..... 635
2. **SAME — DISCRIMINATION — EFFECT OF COMPETITION — REASONABLENESS—EVIDENCE—SUFFICIENCY.** Under 3 Rem. & Bal. Code, § 8626-21, providing that no common carrier shall give any undue or unreasonable preference to any person or locality, it is an unreasonable and unlawful discrimination for a railroad company to charge less rates on class commodities from Seattle than from Tacoma to the "jobbing center" of Spokane and tributary points, in order to meet the competitive rates of another railway having a shorter line from Seattle, where it appears that there were no structural, operative or other conditions favoring the haul from Seattle, which was slightly longer than the haul from Tacoma, the difference in rates being sufficiently great to drive the Tacoma manufacturers and jobbers from the markets. *Public Service Commission ex rel. Transportation Bureau of Tacoma Commercial Club v. Northern Pac. R. Co.*.... 635
3. **SAME—STATUTES—CONSTRUCTION.** 3 Rem. & Bal. Code, § 8626-21, forbidding a carrier from giving undue or unreasonable preference or advantages to persons or localities, applies in all instances where no transportation difference intervenes, regardless of the question whether the person, locality, or traffic is affected by the competition of a rival or not. *Public Service Commission ex rel. Transportation Bureau of Tacoma Commercial Club v. Northern Pac. R. Co.*.... 635
4. **CARRIERS—CONTRACTS—BILL OF LADING — ACCEPTANCE — EFFECT—MODIFICATION OF CONTRACT.** Where a bill of lading is requested and sent to the shipper after the shipment has started, for the purpose of attaching it to a draft on a sale of the goods "against document," the shipper has a right to assume that it will contain no stipulations other than those agreed upon; hence the shipper would not be bound by unauthorized limitations in the bill, unless, in addition to the receipt of the bill, the shipper actually consented thereto by receiving and accepting the bill as a modification of the contract. *Revilla Fish Products Co. v. American-Hawaiian Steamship Co.* 49

CARRIERS—CONTINUED.

5. CARRIERS—OF GOODS—CONTRACT OF CARRIAGE—AGREEMENT AS TO TIME—EVIDENCE—QUESTION FOR JURY. In an action for damages for failure to move a scenery car on time, whether there was a promise to move scheduled trains on time, is a question for the jury, where the plaintiff's manager testified that he informed the defendant's agent of the necessity of moving the car on time for an evening performance, and rather than take chances on the scheduled train being late, preferred to hire a special train, and was informed that the connecting train was a local train, made up at P. and would not be late, whereupon he paid for moving the car by the scheduled train. *Auditorium Theatre Co. v. Oregon-Washington R. & Nav. Co.* 277
6. CARRIERS—CONTRACT—ACTION FOR BREACH—DEFENSES. A shipper of oil cannot recover for loss occasioned by reason of shipping in improper retainers; not because of any contributory negligence, but because such exception abrogates the common law liability of the carrier. *Revilla Fish Products Co. v. American-Hawaiian Steamship Co.* 49
7. CARRIERS—OF GOODS—LIMITED LIABILITY—CONTRACTS—VALIDITY—EVIDENCE—SUFFICIENCY. A contract to carry household goods at a reduced rate upon the shipper's signing a contract releasing the goods to a valuation of five dollars per hundred pounds, is not shown to have been unfairly made, by the fact that, when the shipper applied for rates, the agent was unable to give him any and kept him waiting several days to hear from headquarters and finally made the rate himself, presenting the receipt without explaining the two rates; and the shipper cannot claim ignorance of the contract from the fact that he did not read it, where nothing was said to mislead him. *Davis v. Northern Pac. R. Co.*..... 261
8. SAME—CONTRACTS—LIMITED LIABILITY. Where goods had been shipped under a limited liability contract, and were held at a connecting point for prepayment of freight, a change of destination, with prepayment to the new destination at the reduced rate, does not abrogate the original contract limiting the liability, where there was a mere diversion of the goods from one point to another, and the shipper was in a position to insist upon the lower rate. *Davis v. Northern Pac. R. Co.*..... 261
9. SAME—KNOWLEDGE OF SHIPPER—FRAUD. A shipper of household goods who signs a contract releasing the goods at a valuation of five dollars per hundred pounds in consideration of a lower rate, is bound to know that there was more than one rate, and cannot say that he had no notice of the release clause, in the absence of any misrepresentations, fraud, or deceit. *Davis v. Northern Pac. R. Co.* 261

CARRIERS—CONTINUED.

10. **CARRIERS—PASSENGERS—RELATION—STREET RAILWAYS—ACCIDENTS TO PERSONS NEAR TRACKS.** Where plaintiffs had alighted from a street car upon a platform, and were walking along the side of the car, they ceased to be passengers, and the company was not liable when the car was started around a curve, causing the overhang of the car to swing out and strike the plaintiffs; as ordinary prudence required plaintiffs to take notice that there was an overhang to an ordinary street car when rounding a curve. *Gannaway v. Puget Sound Traction, Light & Power Co.*..... 655
11. **CARRIERS—INJURY TO PASSENGERS—ASSAULT BY FELLOW PASSENGERS—DUTY OF PROTECTION—QUESTION FOR JURY.** Whether a steamship company exercised the highest degree of care demanded by the circumstances to protect a passenger from the renewal of an assault by a drunken fellow passenger, and whether it had reasonable grounds to anticipate a recurrence of the assault and took effective means to guard against it, are questions for the jury, where plaintiff was brutally assaulted without provocation, by a powerful and dangerous drunken passenger, and the steward, after stopping the first assault, induced the assailant to go to another room telling a fireman to keep an eye on those concerned, there being no one present to prevent a renewal of the assault about 10 minutes later. *Kelly v. Navy Yard Route.*..... 148
12. **CARRIERS—INJURY TO PASSENGERS—SETTING DOWN PASSENGERS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** It is not negligence for a street car conductor to fail to notice that passengers who had alighted near a curve had placed themselves in a place of danger from the overhang of the car when the car was started around the curve, where it appears that the accident happened after dark, and the lights inside the car prevented the conductor from seeing anything outside. *Gannaway v. Puget Sound Traction, Light & Power Co.* 655
13. **CARRIERS—ASSAULT BY FELLOW PASSENGER—EXCESSIVE VERDICT.** A verdict for \$1,000 for an assault upon a passenger, who was badly beaten up and suffered partial loss of hearing, coupled with humiliation and loss of time, is not excessive. *Kelly v. Navy Yard Route* 148

CAUSE OF ACTION:

Joinder of, see **ACTION**, 2.

CERTIFICATE:

Forging certificate of identification, see **FORGERY**.

CHALLENGE:

To jurors in condemnation proceedings, see **EMINENT DOMAIN**, 18.

To judge, see **JUDGES**.

To juror, see **JURY**.

CHANGE:

Of grade of street, see **HIGHWAYS**, 1; **MUNICIPAL CORPORATIONS**, 5, 14, 15.

CHANGE OF VENUE:

Of civil actions, see **VENUE**.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 2.

To jury in civil actions, see **TRIAL**, 3, 4.

CHATTEL MORTGAGES:

By Indian, see **INDIANS**, 4, 6.

1. **CHATTEL MORTGAGES—FAILURE TO RECORD—VALIDITY—SUBSEQUENT CREDITORS.** Although Rem. & Bal. Code, § 3660, provides that a chattel mortgage is void as against creditors unless recorded, an unrecorded chattel mortgage is valid as between the parties and creditors subsequent to its execution who acquired no specific lien upon the property up to the time when it was finally filed for record. *Pacific Coast Biscuit Co. v. Perry*..... 352
2. **CHATTEL MORTGAGES—RECORDING—RENEWAL—AFFIDAVITS — NOTICE—SUBSEQUENT PURCHASERS.** Under Rem. & Bal. Code, § 3662, providing that a recorded chattel mortgage shall cease to be notice as against creditors and subsequent purchasers, after the maturity of the mortgage, unless within two years thereafter it is renewed by the making and filing of an affidavit by the mortgagee, a subsequent mortgagee for value in good faith acquires a valid lien after the maturity of the mortgage, subject only to the possibility that the prior mortgage may be renewed within the two years; the statute being, in substance, a statute of limitations. *Best v. Felger*... 115

CHECKS:

See **BANKS AND BANKING**, 2.

CHILD:

Setting aside homestead for support of, see **HOMESTEAD**.

Custody of child, see **PARENT AND CHILD**, 1.

Naming children in will, see **WILLS**, 1.

CITATION:

See **PROCESS**.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CITIZENS:

Equal protection of laws, see **CONSTITUTIONAL LAW**, 2.

CLAIMS:

To property subjected to garnishment, see GARNISHMENT.
Of lien, see MECHANICS' LIENS, 6-8.

COLLATERAL UNDERTAKING:

See FRAUDS, STATUTE OF, 1.

COLLECTION:

By bank, see BANKS AND BANKING, 2.

COLLUSION:

In obtaining decree, see DIVORCE, 2.

COMMENT:

On evidence in instructions, see MASTER AND SERVANT, 5.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.
Compulsory installation of side track connections as interference with interstate commerce, see RAILROADS, 3.

COMMISSIONERS:

Powers of county commissioners to reconsider application for order prohibiting stock running at large, see ANIMALS, 2.

COMMISSIONS:

Of broker, see BROKERS, 2, 3.
Liability of third persons for commissions of salesman employed by broker, see CONTRACTS, 2.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE.
Specific performance of contract to convey, see SPECIFIC PERFORMANCE, 2.

COMPENSATION:

Of broker, see BROKERS, 2, 3.
For performance of contract, see CONTRACTS, 2.
For property taken or damaged for public use, see EMINENT DOMAIN, 9-11, 22, 27-29, 31-33.
Minimum wage for public work, see MUNICIPAL CORPORATIONS, 11-13, 26, 27.
For diversion of waters of river by state, see NAVIGABLE WATERS, 2.
Of witness, see WITNESSES.

COMPETENCY:

- Of experts as witnesses, see EVIDENCE, 3, 4.
- Of evidence in civil actions, see EVIDENCE, 4.

COMPETITION:

- As affecting discrimination in rates, see CARRIERS, 2, 3.

COMPLAINT:

- In criminal prosecutions, see INDIOTMENT AND INFORMATION.

COMPUTATION:

- Division of profits under contract for herding sheep, see ANIMALS, 1.

CONCLUSION:

- Of witness, see EVIDENCE, 3, 4.

CONCLUSIVENESS:

- Of order prohibiting live stock to run at large, see ANIMALS, 2.
- Of election of remedy, see ELECTION OF REMEDIES.
- Of condemnation improvement, see EMINENT DOMAIN, 30.

CONDEMNATION:

- Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONS:

- In contracts, agreement upon, see CONTRACTS, 1.

CONDUCT:

- Of counsel at criminal prosecution, see CRIMINAL LAW, 4, 6.
- Of counsel ground for new trial, see NEW TRIAL, 1.
- Of jury ground for new trial, see NEW TRIAL, 2, 3.

CONGRESS:

1. CONGRESS—"GENERAL" ACTS—APPROPRIATION BILLS. An act of Congress cannot be said to be not general and limited in its application to the time of its passage, because it was part of a bill appropriating money for a specified year; since general acts of Congress may be tacked onto appropriation bills. *Rider v. LaClair*. 433

CONSIDERATION:

- Of assignment, see ASSIGNMENTS.
- For credit on receiving check for collection, see BANKS AND BANKING, 2.
- Of bill of exchange or promissory note, see BILLS AND NOTES.
- For stock subscription, see CORPORATIONS, 1, 2.
- Return of on rescission of sale, see SALES, 1.

CONSPIRACY:

- Acts and conduct of conspirators as evidence, see EVIDENCE, 3.

CONSTITUTIONAL LAW:

- Condemnation of property for "private ways of necessity," see **EMINENT DOMAIN**, 3.
- Compulsory installation of side track as taking of property without due process of law, see **RAILROADS**, 2.
- Subjects and titles of statutes, see **STATUTES**, 1.
- Amendment of constitution, see **STATUTES**.

- 1. **CONSTITUTIONAL LAW—AMENDMENTS—PROPOSAL—PASSAGE—REQUISITES—"ENTRY."** Const., art. 23, § 1, requiring that amendments to the constitution proposed by the legislature shall be agreed to by two-thirds of the members elected to each of the two houses and "entered on their journals" does not require the copying of the entire proposed amendment in the journals of the Senate and House, but is complied with by a memorandum entry by reference to the proposal, using the language of the title of the act. *Tabor v. Walla Walla*..... 579

- 2. **CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—DUE PROCESS—EQUAL PROTECTION OF LAWS.** An act authorizing the condemnation of a street railway and its franchises (Rem. & Bal. Code, § 8005), does not impair the obligation of the contract, or deprive a person of property without due process, or deny the equal protection of the laws. *State ex rel. Peabody v. Superior Court*..... 593

- 3. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EMINENT DOMAIN—TAKING PRIVATE PROPERTY.** The taking of private property for private use for the promotion of the general welfare, upon due hearing and the payment of consideration, is not incompatible with the Federal guarantee of due process of law. *State ex rel. Mountain Timber Co. v. Superior Court*..... 585

- 4. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PLEADINGS—AMENDMENT.** An amendment of a complaint so as to present issuable facts, as directed by the supreme court upon a former appeal, does not deprive the defendant of property without due process of law. *Oldfield v. Angeles Brewing & Malting Co.*..... 158

CONSTRUCTION:

- Of contract for herding sheep and division of profits, see **ANIMALS**, 1.
- Of assignment, see **ASSIGNMENTS**.
- Of statute forbidding unreasonable preference in rates, see **CARRIERS**, 3.
- Of contract, see **CONTRACTS**, 1, 3, 4.
- Of statute relating to condemnation by telephone and telegraph companies, see **EMINENT DOMAIN**, 2.
- Of statutes authorizing condemnation of street railway by city, see **EMINENT DOMAIN**, 6, 7.
- Of statute requiring compensation in money for property taken for public use, see **EMINENT DOMAIN**, 10, 11.

CONSTRUCTION—CONTINUED.

- Of contract to grade street, see **HIGHWAYS**, 1.
- Of statute providing for setting aside homestead for widow and children, see **HOMESTEAD**.
- Of lien laws, see **MECHANICS' LIENS**, 2, 3.
- Of statute defining limit of assessment district, see **MUNICIPAL CORPORATIONS**, 16.
- Initiative and referendum laws, see **STATUTES**, 2, 3.
- Of contract of sale, see **VENDOR AND PURCHASER**, 4.
- Of statute providing for change of judges for prejudice, see **VENUE**, 1.
- Of statute providing for naming of children in will, see **WILLS**, 1.

CONTEMPT:

- For failure to pay alimony, see **DIVORCE**, 3-5.
- Change of venue for bias of judge, see **VENUE**, 1.
- 1. **CONTEMPT—EVIDENCE—SUFFICIENCY.** A conviction for contempt of court, in the use of language deemed contemptuous in written exceptions filed, is not sustained, where the language used was invited by the court in unnecessary criticism of accused's conduct outside the duty of the court, and both were to blame. *State v. Wright* 551
- 2. **CONTEMPT—PUNISHMENT.** There is no inherent right vested in any particular judge to hear and determine a charge of constructive contempt committed out of the presence of the court. *State ex rel. Russell v. Superior Court*..... 631

CONTRACTORS:

- Liability for acts of independent contractors in setting off blast, see **MASTER AND SERVANT**, 12.
- Enforcement of mechanics' lien, see **MECHANICS' LIENS**, 2-4, 6, 8.
- Liability to abutting owners from change of grade, see **MUNICIPAL CORPORATIONS**, 14.
- Liability for injury from defect in sidewalk, see **MUNICIPAL CORPORATIONS**, 32.
- Liability of owner to subcontractor through reliance upon statements of architect, see **PRINCIPAL AND AGENT**, 1.
- Overpayment to by principal as release of surety, see **PRINCIPAL AND SURETY**.

CONTRACTS:

- See **BILLS AND NOTES**; **CORPORATIONS**, 4.
- Laborers' contract to clear land, see **AGRICULTURE**.
- For herding sheep and division of profits, see **ANIMALS**, 1.
- Assignment, see **ASSIGNMENTS**.
- Carriage of goods, see **CARRIERS**, 4-9.
- Impairing obligation, see **CONSTITUTIONAL LAW**, 2.

CONTRACTS—CONTINUED.

Stipulated damages or penalties, see DAMAGES, 1.
 Damages for breach, see DAMAGES, 1-3.
 Of bailment, see EMBEZZLEMENT, 1.
 Conclusion of witness in action for breach, see EVIDENCE, 3.
 Agreements within statute of frauds, see FRAUDS, STATUTE OF.
 To grade county road, see HIGHWAYS, 1.
 By Indians, see INDIANS, 4, 6.
 Leases, see LANDLORD AND TENANT.
 Ground for mechanics' liens, see MECHANICS' LIENS, 2-4.
 For public improvements, see MUNICIPAL CORPORATIONS, 2, 5, 9, 10.
 Specific performance, see SPECIFIC PERFORMANCE.
 Sales of realty, see VENDOR AND PURCHASER.

1. CONTRACTS—REQUISITES—AGREEMENT UPON TERMS—CONSTRUCTION.
 A contract whereby two persons agree to enter the fur trade by placing a stock of trade goods at such place as they may select, the stock to consist of such wares as they may deem proper, is not binding until they agree upon the place selected or approve a stock of goods which they deem suitable. *Webster v. Beau*..... 444
2. CONTRACTS—EMPLOYMENT—SERVICES—LIABILITY OF THIRD PERSONS.
 A real estate salesman, employed by a brokerage company to work for it, and receiving as compensation a share of the commissions earned on his sales, cannot recover the amount of such commissions from clients of the brokerage company, without any garnishee process or recovery of judgment against his employer. *Warner v. Empire Realty Co.* 581
3. CONTRACTS—CONSTRUCTION. An agreement that the defendant might draw against the proceeds of the sale of his stock, sold for him by the plaintiff, is not affected by the fact that part of the proceeds is represented by the purchaser's promissory note, where plaintiff had pledged the note as collateral and claimed to own it. *Gold Ridge Mining and Development Co. v. Rice*..... 384
4. CONTRACTS—CONSTRUCTION—"PROFITS"—PERFORMANCE OR BREACH—MATURITY. Under a contract whereby a judgment creditor agreed to extend the time of payment of the debt for five months, in consideration of which the judgment debtor was to allow a third person to work his teams and grading outfit on a certain city job, at \$3.50 per day for each team, less the cost of feed not to exceed \$40 per month for each team, and less \$75 per month for himself, and the third person agreed to pay on the judgment one-half the net "profits" earned on the job by said teams and outfit, less the sum of \$75 per month for the services of the debtor and less certain interest charges, the same to be held until the completion of the job which completion should not extend beyond the period of five months, the word "profits" refers to the amount earned by the teams, less the feed bill and less \$75 a month for the services of the debtor and the interest,

CONTRACTS—CONTINUED.

and not to "profits" on the city job; and the payment matures and is due at the end of five months, although the city job was not completed at that time. *Graib v. Peterson*..... 357

5. **CONTRACTS—PERFORMANCE OR BREACH—DEFAULT—WAIVER.** A provision for stipulated damages in case of a default in a contract to plant a tract of land to apple trees as early in the spring of 1912 as the weather will permit, and to plant a cover crop between the rows at the same time, is waived, where the plaintiff, after commencing suit on the default May 13, at which time planting had not commenced, wrote a letter to defendant on May 20th, knowing that work was in progress (planting being finished June 8), that it would be satisfactory if the cover crop were planted by September 1st; since an offer and acceptance of part performance prevents recovery of liquidated damages. *Sledge v. Arcadia Orchards Co*..... 477
6. **CONTRACTS—BREACH—ACTIONS—DAMAGES—PENALTY—OFFER OF PROOF—SUFFICIENCY.** In an action to recover on a penalty for a breach of contract to plant one hundred acres of land to apple trees in the spring of 1912 as early as the weather will permit, in which it appeared that the land was covered with stumps and brush when the contract was made Nov. 11, 1911, and little of the work of clearing and plowing could be done in the winter, and that the planting was completed June 8th, an offer to prove by an expert that the planting season was usually from April 1st to the middle or last of May, and that trees planted later would be retarded in bearing for one year, is insufficient as an offer to prove pecuniary damages; since it did not tend to show a breach of the contract, which was substantially performed, and was not followed by offer of proof of the amount of the pecuniary damages sustained. *Sledge v. Arcadia Orchards Co.* 477
7. **CONTRACTS—PERFORMANCE OR BREACH—EVIDENCE—QUESTION FOR JURY.** In an action for breach of an oral contract, where the testimony was conflicting, plaintiff claiming that the defendants had sublet them certain railroad concrete work and guaranteed there would be 1,800 yards of it, while defendants claimed that they did not guarantee any amount, but sublet the concrete work on ten miles of road, subject to any change in plans by the company, be the same more or less, and that they had settled with and overpaid the plaintiffs for all the work done, amounting to 119 yards, the questions are for the jury, under proper instructions; nor could the court say, as a matter of law, that defendants' tender of 160 additional yards, which could only be done at a loss, would be a substantial compliance with their contract guaranteeing a balance of approximately 1,700 yards. *Culver v. Oulliton*..... 457
8. **CONTRACTS—BREACH—DEFENSES.** It is no defense to an action for the breach of a contract to employ the plaintiff to do the plastering

CONTRACTS—CONTINUED.

of a building, under construction by defendant, that the architects had not consented to a subcontract, as required in the principal contract, where it did not appear that his consent had been asked or that he had refused consent; especially where the defendant was the one who should have secured such consent. *Wohlforth v. Kuppler* 339

CONTRIBUTORY NEGLIGENCE:

Of person killed by high power transmission line, see **ELECTRICITY**.
Of servant, see **MASTER AND SERVANT**, 9, 10.
Of person injured on street, see **MUNICIPAL CORPORATIONS**, 33, 34.
Of driver of team at railroad crossing, see **RAILROADS**, 5.

CONVEYANCES:

See **ASSIGNMENTS**; **CHATTEL MORTGAGES**; **MORTGAGES**.
In fraud of wife, see **FRAUDULENT CONVEYANCES**.
Separate property of married women, see **HUSBAND AND WIFE**.
Contracts to convey, see **VENDOR AND PURCHASER**.

CORPORATIONS:

See **MUNICIPAL CORPORATIONS**.

Acquisition of property by condemnation, see **EMINENT DOMAIN**, 2-8, 10-16, 27-33.

1. **CORPORATIONS—STOCK — SUBSCRIPTIONS — PAYMENT IN PROPERTY—CONSIDERATION.** A sale to a mining corporation, by two of its trustees, of a bond upon a group of mining claims, in full consideration of their stock subscriptions, unanimously agreed to by the trustees, is valid as between the parties, where no rights of creditors are involved, the deal was in the open, and no one was wronged. *Gold Ridge Mining and Development Co. v. Rice*..... 384
2. **CORPORATIONS—STOCK — SUBSCRIPTIONS—PAYMENT IN PROPERTY—OVERVALUATION—LIABILITY TO CREDITORS.** Where an insolvent corporation conveyed all its assets to a clerk of one of its officers, who subscribed for all the stock of a reorganized company, transferring the assets to it in full payment of the stock, which she transferred proportionally to the stockholders of the old company, such stockholders are subscribers to the stock of the new company, and having paid but a nominal consideration for their stock, they are liable to creditors on their unpaid stock subscriptions, on the trust fund theory, requiring stock to be paid for in money or money's worth. *German-American State Bank v. Soap Lake Salts Remedy Co.*... 382
3. **CORPORATIONS — STOCK — SALE — VALIDITY — ESTOPPEL.** A corporation receiving and holding the proceeds of the sale of its stock cannot assert that the sale was not binding upon it. *Gold Ridge Mining and Development Co. v. Rice*..... 384

CORPORATIONS—CONTINUED.

4. **CORPORATIONS—WRITTEN CONTRACTS—AUTHORITY OF OFFICERS.** A lease executed by the president and secretary of a corporation but not attested by the corporate seal, is not admissible without proof of their authority, express or implied, or ratification by the corporation, where their authority was denied. *Oldfield v. Angeles Brewing & Malting Co.* 158

COSTS:

Mileage of witness, see **WITNESSES.**

1. **COSTS—ON APPEAL—TAXATION.** On the reversal by the supreme court of the United States of a decision of the supreme court of the state, the clerk of this court may refuse to tax as costs items of expenditure in the preparation of the appeal to the Federal court that were paid without the intervention of this court or the clerk's office, and which could not be checked by reference to our statutes or practice, and which appear to be taxable, if at all, in the Federal court. *Ettor v. Tacoma*..... 267

COUNTIES:

Prohibiting live stock from running at large, see **ANIMALS, 2.**
Assessment of live stock for taxation, see **TAXATION, 2.**

COURTS:

Jurisdiction in equity, see **ACTION, 2.**
Review of decisions, see **APPEAL AND ERROR.**
Contempt of court, see **CONTEMPT.**
Jurisdiction in divorce, see **DIVORCE, 6.**
Condemnation proceedings, see **EMINENT DOMAIN.**
Judges, see **JUDGES.**

CREDIT:

By bank on deposit of checks for collection, see **BANKS AND BANKING, 2.**

CREDITORS:

Rights as to chattel mortgage by debtor, see **CHATTEL MORTGAGES.**
Liability to on stock subscriptions, see **CORPORATIONS, 1, 2.**

CRIMINAL LAW:

See **CONTEMPT; EMBEZZLEMENT; FORGERY.**
Contempt in failing to pay alimony, see **DIVORCE, 3-5.**
Extradition of persons accused, see **EXTRADITION.**
Habeas corpus to obtain release, see **HABEAS CORPUS.**
Indictment, information, or complaint, see **INDICTMENT AND INFORMATION.**
Larceny of live stock from range, see **LARCENY.**

CRIMINAL LAW—CONTINUED.

1. CRIMINAL LAW—RES GESTAE—LARCENY. Upon a prosecution for larceny by embezzlement, evidence that, after obtaining the money, the accused made purchases of valuable personal property, is admissible as part of the *res gestae*, and to show motive by acts and conduct. *State v. Pettit*..... 67
2. SAME—"FLIGHT"—INSTRUCTIONS. An instruction on the subject of flight as showing a guilty knowledge or qualified admission of guilt, that flight is a departure from the locality of the crime and residence of the accused induced or caused in any degree by fear of arrest or consciousness of guilt, is proper; and it is not necessary for the jury to further find a purpose to escape or concealment to avoid arrest. *State v. Pettit*..... 67
3. SAME—EVIDENCE—ACTS OF CONSPIRATORS. Upon a prosecution for larceny by embezzlement, evidence of the acts and conduct of a codefendant in furtherance of a common criminal design, where there was concert of action, is competent and relevant, whether before or after the asportation. *State v. Pettit*..... 67
4. CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. In a prosecution for larceny by embezzlement, in which it appeared that a judgment had been obtained against the accused in a civil action, which judgment had not been paid, it is not *per se* objectionable for the prosecuting attorney to argue to the jury that the presence of the accused was evidence that every step had been taken to get the money from him. *State v. Jakubowski*..... 78
5. CRIMINAL LAW—TRIAL—PROVINCE OF COURT AND JURY—QUESTION OF FACT. Upon a prosecution for the larceny of "one head of neat cattle," referred to by the complaining witness as a steer, while defendant justified the taking of a "bull," claiming title, the court may not conclude the question of fact as to which was the correct description. *State v. Crossen*..... 438
6. CRIMINAL LAW—APPEAL—RECORD—MISCONDUCT OF COUNSEL—STATEMENT OF FACTS—AFFIDAVITS. Error cannot be assigned upon improper remarks by counsel in argument to the jury when they are not preserved in the record and certified to by the judge as actually having been made; and they cannot be shown by mere claims of counsel and exceptions allowed by the court, or by affidavits. *State v. Jakubowski*..... 78
7. CRIMINAL LAW—APPEAL—REVIEW—VERDICT. The supreme court will not disturb a conviction for insufficiency of the evidence, where there was evidence to support the verdict. *State v. Jakubowski*. 78

CROPS:

Mortgage or sale of by Indian, see INDIANS, 4.

CROSSINGS:

Accident at railroad crossing, see **RAILROADS**, 5.

CRUELTY:

Ground for divorce, see **DIVORCE**, 1.

CUSTODY:

Of child, see **DIVORCE**, 6.

DAMAGES:

See **LIBEL AND SLANDER**, 2.

Joinder of equity and law action, see **ACTION**, 2.

For fraud of agent, see **BROKERS**.

Breach of contract of carriage, see **CARRIERS**, 5, 6.

For assault by fellow passenger, see **CARRIERS**, 13.

Waiver of on default in contract, see **CONTRACTS**, 5.

On breach of contract, evidence of, see **CONTRACTS**, 6.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 9-11, 22, 27-29, 31-33.

For trespass upon stay of ejectment to permit condemnation proceedings, see **EMINENT DOMAIN**, 22.

For fraud, see **FRAUD**, 2.

For change of grade of street, see **HIGHWAYS**, 1.

To tenant from defective premises, see **LANDLORD AND TENANT**, 3-5.

For breach of contract to lease building, see **LANDLORD AND TENANT**, 6-8.

Injuries caused by public improvements, see **MUNICIPAL CORPORATIONS**, 5, 14, 15.

Rights of riparian owners for diversion of waters of river, see **NAVIGABLE WATERS**, 2.

For breach of warranty, see **SALES**, 2.

Instructions as to limit of recovery, see **TRIAL**, 4.

Breach of contract for sale of land, see **VENDOR AND PURCHASER**, 4.

1. **DAMAGES—CONTRACT—BREACH—STIPULATED DAMAGES OR PENALTY.**

An agreement for stipulated damages for breach of a contract cannot be sustained, except as a penalty authorizing recovery only of pecuniary damages actually sustained, where it provided that \$60 per acre was to be paid plaintiff for each acre of a hundred acre tract which the plaintiff failed, (1) to plant to apple trees in the spring or 1912 as early as the weather would permit, (2) to plant to a cover crop between the rows, and (3) to care for the trees after planting; since the same sum was to fall due for a minor or partial default as for a total default, and also on default in any one of the three particulars, all of which were of different degrees of importance, and could not be the proper subject for stipulated damages in the same amount, making the damages stipulated for unreasonable in relation to the gravity of the default for which they were to compensate. *Sledge v. Arcadia Orchards Co.*..... 477

DAMAGES—CONTINUED.

2. **DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES—ANTICIPATED PROFITS.** Anticipated profits cannot be recovered for breach of a contract of partnership to establish an entirely new fur trading business in a remote and sparsely settled country, under dangerous and adverse conditions, there having been no existing business; as the same are too remote, uncertain, and speculative. *Webster v. Beau* 444
3. **SAME—MEASURE OF DAMAGES—EXPENSES AND LOSS OF TIME.** Upon breach by defendant of a contract of partnership whereby plaintiff was to establish a new fur trading business in a remote and sparsely settled country, without reference to any existing business, the plaintiff may recover for losses sustained in the way of expenses incurred or loss of time in performing his part of the agreement. *Webster v. Beau* 444
4. **DAMAGES—PERSONAL INJURIES—AMOUNT OF RECOVERY—INSTRUCTIONS.** An instruction limiting the damages for personal injuries to what will fairly and justly compensate the plaintiff for injuries shown by the evidence, is not erroneous in that it further refers to the items of lost time, and for permanent disfigurement, limiting each to the amount specified in the bill of particulars; nor on the ground that it assumes the fact of permanent disfigurement. *Johansen v. Pioneer Mining Co.*..... 422
5. **DAMAGES—PERSONAL INJURIES—DEFENSES—AGGRAVATION OF DISEASED CONDITION—INSTRUCTIONS.** In an action for personal injuries, in which there was an affirmative defense to the effect that plaintiff's present condition was due to a previous diseased condition, it is not error to instruct to the effect that a previous diseased condition would only go to the amount of the recovery and that defendant would be liable only for aggravation thereof, if any, and if the jury find for the plaintiff, the defense pleaded would not be a separate affirmative defense but could only be considered in determining the amount of the recovery. *Britz v. Houlehan*..... 506
6. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** The damages in a personal injury case will not be held excessive where, if the plaintiff's evidence is believed, there was substantial evidence to sustain the amount of the verdict. *Loy v. Northern Pac. R. Co.*.. 25
7. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$3,000 for injuries sustained when struck by a passenger train at a crossing is not excessive, where plaintiff was rendered unconscious, his wrist broken and crushed, and his shoulder badly injured, and his injuries were permanent. *Schwartz v. Northern Pac. R. Co.*.. 44
8. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$5,000 for personal injuries, reduced by the trial court to \$3,000 is not excessive, where it appears that the plaintiff, 30 years of age,

DAMAGES—CONTINUED.

- earning \$125 per month as a switchman, sustained a fracture of his leg, and a dislocation of his ankle, lost \$600 or \$700 in wages, and had not fully recovered seven months after the accident. *Altier v. Hainsworth* 113
9. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$4,500 is excessive and should be reduced to \$2,500, where plaintiff claimed that his left ankle was severely sprained and the instep broken down, which at times becomes swollen and prevents work at hard manual labor, and it appears that he continued at work for some days, and the evidence as to the extent of the injury was conflicting. *Magnuson v. MacAdam*..... 289
10. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$18,000 for personal injuries sustained by a miner 29 years of age, earning \$4 a day and board and lodging, is not excessive where he was severely crushed and injured. *Johansen v. Pioneer Mining Co.* 421
11. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$2,000 will not be held excessive, where plaintiff, a painter, in a fall of over fifty feet into a river, sustained a rupture and an independent injury to the left side, problematical as to its character and duration. *Hayes v. Northern Pac. R. Co.*..... 671

DEATH:

From high power transmission line, see **ELECTRICITY**.

DEBT:

Agreement to pay debt of another, see **FRAUDS, STATUTE OF, 1**.
Garnishment of, see **GARNISHMENT**.

DECISION:

Decisions reviewable, see **APPEAL AND ERROR, 1**.
On appeal as law of case, see **APPEAL AND ERROR, 31-36**.
On appeal, see **APPEAL AND ERROR, 37-40**.

DEDICATION:

1. **DEDICATION—BY PAROL—WHAT CONSTITUTES.** There is a parol dedication of an alley where the owner of a block divided it by fencing off each side, leaving an alley uninclosed connecting two public streets, and then sold all the property abutting on both sides of the alley, which was continuously used with his consent and approval for ten years. *Humphrey v. Krutz*..... 152
2. **SAME—DEDICATION—BY PAROL PROOF.** A parol dedication rests in intention and may be proven by parol. *Humphrey v. Krutz*. 152
3. **DEDICATION—ALLEYS — ESTOPPEL — PAYMENT OF TAXES.** The payment of taxes and assessments upon a strip of land dedicated as a public alley does not estop the city or abutters from asserting its public character. *Humphrey v. Krutz*..... 152

DEEDS:

Description of boundary, see **BOUNDARIES**, 1.
Cancellation, see **CANCELLATION OF INSTRUMENTS**.

DEFAULT:

Waiver of, see **CONTRACTS**, 5.

DEFECT:

In leased premises, see **LANDLORD AND TENANT**, 3-5.
In title of vendor, see **VENDOR AND PURCHASER**, 1, 3.

DEMAND:

For side track connection, see **RAILROADS**, 1.

DEMURRER:

To officer's return, effect, see **HABEAS CORPUS**.

DENIALS:

In pleading, see **PLEADING**, 1.

DEPOSITS:

In bank, see **BANKS AND BANKING**, 2.

DESCENT AND DISTRIBUTION:

See **HOMESTEAD**.

DESCRIPTION:

Of property in petition in condemnation proceedings, see **EMINENT DOMAIN**, 13.

DETERMINATION:

Of benefits to property from improvement, see **EMINENT DOMAIN**, 19, 25, 26.

DEVISES:

See **WILLS**.

DISCHARGE:

From liability as surety, see **PRINCIPAL AND SURETY**.

DISCRETION OF COURT:

Review of ruling on motion for new trial, see **APPEAL AND ERROR**, 15.
Appointment of guardian for insane person, see **INSANE PERSONS**.
Grant of new trial for conduct of counsel, see **NEW TRIAL**, 1.
Submission to jury of special interrogatories, see **TRIAL**, 2.
Refusal to rescind contract, see **VENDOR AND PURCHASER**, 1.

DISCRIMINATION:

In freight rates, see **CARRIERS**, 1-3.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see **APPEAL AND ERROR**, 13.

DISQUALIFICATION:

Of judge, see **JUDGES**.

DISTRAINT:

For personal property tax, see **TAXATION**, 1.

DIVERSION:

Of water course, see **EMINENT DOMAIN**, 9, 16.

Of waters of river, see **NAVIGABLE WATERS**, 2.

DIVORCE:

As defense to action for support of child, see **PARENT AND CHILD**, 2, 3.

1. **DIVORCE—GROUNDS—CRUELTY—EVIDENCE—SUFFICIENCY.** A decree of divorce, asked by both parties to the action on the ground of cruel treatment, is not warranted and cannot be sustained on appeal merely because the trial judge was of the opinion that the "ends and objects of society" would best be subserved by granting the decree, where neither party produced sufficient evidence to sustain the charge of cruelty; it not being enough to show want of regard for each other, disposition to quarrel over trifles, or that they can no longer live together in peace and harmony. *Ellis v. Ellis*..... 247
2. **DIVORCE—VACATION OF DECREE—COLLUSIVE SUIT—PETITION FOR VACATION—SUFFICIENCY.** A decree of divorce will not be vacated at the suit of the successful plaintiff, for fraud in obtaining it, and her petition is demurrable for want of sufficient facts, where the gist of the petition was that her husband represented to her that the marriage embarrassed him financially and that he would get his business affairs adjusted and remarry her within six months, and otherwise he would be compelled to leave the state and he would give her no financial assistance, it being alleged that she was finally persuaded to bring the action, consenting to go before the court and tell the exact situation, which it appears she did not do, the inference from the allegations being that she testified falsely or suppressed material facts in the trial of the divorce case, resulting in findings sustaining the decree of divorce; since the petition shows nothing more than a collusive arrangement to obtain a divorce. *Robinson v. Robinson* 663
3. **DIVORCE—ALIMONY—CONTEMPT—ACCRUING PAYMENTS.** In contempt proceedings to enforce alimony, objection cannot be made to the judgment in that it punishes for violation of distinct orders and the failure to pay money not due when the order of arrest was made, where the accumulations all relate to one modified order in

DIVORCE—CONTINUED.

aid of which the arrest was made, and defendant had full notice of the due and accruing payments, and answered to the merits without objection; the jurisdiction of the court being a continuing one. *Croft v. Croft* 620

4. **SAME—ALIMONY—CONTEMPT—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF.** A conviction for contempt in failing to pay \$986 support money, the amount of accumulated payments at \$20 per month, awarded in a decree of divorce, is sustained where it appears that the defendant had never made any payments, that he was an able-bodied man, earning \$3.50 a day at the time of the hearing, had remarried, and had received \$500 from his father at one time during the period, and his credit was such that he had been able to run in debt over \$1,000; the burden of proof being upon him to show his inability to pay. *Croft v. Croft*..... 620
5. **DIVORCE—ALIMONY—ENFORCEMENT—CONTEMPT—EVIDENCE — ADMISSIBILITY.** In contempt proceedings to enforce the payment of alimony, it is not error to exclude evidence as to property conveyed to the wife prior to the entry of the decree of divorce, since that was presumably considered at that time. *Croft v. Croft*..... 620
6. **DIVORCE—CUSTODY AND SUPPORT OF CHILD—JURISDICTION.** The fact that the defendant wife in an action for divorce was a nonresident, does not prevent the court from making orders for the custody and support of a child, if defendant appears and submits herself and child to the jurisdiction of the court. *Schoennauer v. Schoennauer* 132

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**, 2-4.

Compulsory installation of side track as taking of property without due process of law, see **RAILROADS**, 2.

EASEMENTS:

Quieting title to, see **QUIETING TITLE**.

1. **EASEMENTS—NATURE.** An easement, although an incorporeal right, is an interest in land. *Humphrey v. Krutz*..... 152

EJECTMENT:

Stay to permit condemnation proceedings, see **EMINENT DOMAIN**, 21, 22.

ELECTION:

To declare mortgage due for nonpayment of interest, see **MORTGAGES**.

ELECTION OF REMEDIES:

1. **ELECTION OF REMEDIES—CONCLUSIVENESS.** A definite election of one of two inconsistent remedies, by a party cognizant of the ma-

ELECTION OF REMEDIES—CONTINUED.

terial facts is conclusive, and bars recovery on the alternative remedy. *Holt Manufacturing Co. v. Strachan*..... 380

ELECTIONS:

Submission to voters of plan for municipal railway, see MUNICIPAL CORPORATIONS, 4.

Initiative measures, time for filing, see STATUTES, 2, 3.

ELECTRICITY:

1. ELECTRICITY—HIGH POWER TRANSMISSION LINE—NEGLIGENCE—QUESTION FOR JURY. The negligence of an electric light company in the maintenance of high power transmission lines is for the jury, where it appears that its uninsulated wires carrying 16,000 volts along a public highway was only 17 feet high, and extended two feet over the line of the highway onto the land of the deceased, who was killed while working under the line with a piece of iron pipe, which came in contact with the wire, and experts testified that such a wire should properly have been carried 45 feet above the ground. *Card v. Wenatchee Valley Gas & Electric Co.* 564
2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such a case, the contributory negligence of the deceased was a question for the jury, where it appears that deceased was working upon an irrigation flume on his land, in which long iron pipes were used, that he was endeavoring to clear a piece of pipe of obstruction by holding it on end, when it accidentally came in contact with the wire, and the deceased did not know of the extremely dangerous character of the current carried by the wire. *Card v. Wenatchee Valley Gas & Electric Co.*..... 564

EMBEZZLEMENT:

See CRIMINAL LAW, 1-4.

1. EMBEZZLEMENT—BY BAILEE OR PLEDGEE—CONTRACT OF BAILMENT. An agreement, whereby one went upon bonds to secure the payment of lost certificates of deposit, in consideration of which he was to hold the sums paid until such time as the bonds were released, is a contract of bailment, making the party a pledgee or trustee, within the meaning of Rem. & Bal. Code, § 2601, subd. 3, defining larceny by a bailee, pledgee, agent or trustee, etc. *State v. Jakubowski* 78
2. EMBEZZLEMENT—INSTRUCTIONS—FAILURE TO REDELIVER MONEY ON DEMAND. Upon an information for larceny by embezzlement by a bailee, pledgee or trustee, it is proper to instruct that, if the accused received money to hold for the complaining witness until the accused was released from liability on certain bonds, without any agreement that he should have the use of the money, and failed to redeliver it within a reasonable time after being notified that he

EMBEZZLEMENT—CONTINUED.

was released from the bonds, if he was so released, his failure would constitute the offense of larceny as defined by Rem. & Bal. Code, § 2601, subd. 3. *State v. Jakubowski*..... 78

3. **SAME—EVIDENCE—SUFFICIENCY.** Upon a prosecution for larceny by embezzlement by a bailee, pledgee or trustee, the evidence sustains a conviction, making a case for the jury, notwithstanding a sharp conflict in the evidence, where it appeared from the evidence of the state that the prosecuting witness paid the accused \$5 for going on bonds to secure the payment of lost certificates of deposit, the money was delivered to the accused, and a written contract entered into, wherein he agreed to return the money to the prosecuting witness on the release of the bonds, the bonds were released, a civil action to recover the money was prosecuted to judgment, and the accused at first refused to pay the judgment, and thereafter attempted to arrange for payment by installments. *State v. Jakubowski* 78

EMINENT DOMAIN:

Condemnation of private property as taking without due process of law, see **CONSTITUTIONAL LAW**, 2, 3.

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**.

Establishment of waterway district, see **NAVIGABLE WATERS**, 2.

1. **EMINENT DOMAIN—RIGHT OF STATE.** The Federal constitution being a grant of power, and a state constitution a limitation of power, the right of eminent domain is not derived from the constitution, but is inherent in sovereignty, and apart from the constitutional prohibitions, need not be for public use. *State ex rel. Mountain Timber Co. v. Superior Court*..... 585
2. **EMINENT DOMAIN—DELEGATION OF POWER—TELEPHONE AND TELEGRAPH COMPANIES—STATUTES—CONSTRUCTION.** Const., art. 12, § 19, and Rem. & Bal. Code, § 9304, requiring railroad companies to allow telegraph and telephone companies to maintain lines on the railroad right of way, and authorizing such companies to enter upon and appropriate portions of the right of way of a railroad company not interfering with the operation of the railroad, do not limit such companies to the use of railroad rights of way, when they were, by the same sections, given the right of eminent domain generally as to lands "actually necessary" for the line; hence they may condemn a strip of land privately owned, although it is adjacent to a railroad right of way. *State ex rel. De Soucy v. Superior Court*..... 31
3. **EMINENT DOMAIN—TAKING PRIVATE PROPERTY—"PRIVATE WAYS" OF NECESSITY.** Const., art. 1, § 16, prohibiting the taking of private property for private use, except for "private ways of necessity," etc., does not use the term in its common law sense, so as to limit the exception to private ways of necessity appurtenant to some grant, but means "necessary private ways," and it was with-

EMINENT DOMAIN—CONTINUED.

in the constitutional powers of the legislature to define, by Laws, 1913, p. 412 (3 Rem. & Bal. Code, § 5857-1), a private way of necessity as including a logging road right of way necessary for the proper use and enjoyment of private timber lands, and to establish the procedure for condemning the same. *State ex rel. Mountain Timber Co. v. Superior Court*..... 535

4. EMINENT DOMAIN—PERSONS ENTITLED—IrrIGATION COMPANY. An irrigation company entitled to cross the lands of another and divert part of the waters of a creek thereon, having abandoned the old right of way under a license to use another way, has the right to condemn a necessary right of way across such lands to the creek, upon revocation of the license. *Engstrom v. Edendale Land Co.* 658
5. EMINENT DOMAIN—PROPERTY SUBJECT—PROPERTY DEVOTED TO PUBLIC USE. The property of a public service corporation, already devoted to a public use, may be acquired by condemnation in the establishment of a waterway district, under 3 Rem. & Bal. Code, § 8172a, subd. "a" providing that private property and the property of private corporations may be condemned when necessary to make the improvements, and *Id.*, subd. "d," providing for the condemnation of all necessary and needed rights of way in the straightening or improving of the river. *Newell v. Loeb*..... 182
6. EMINENT DOMAIN—BY CITIES—POWER—PROPERTY SUBJECT—STREET RAILWAYS AND FRANCHISES—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 8005, authorizing, in somewhat general terms, a city to construct and operate a municipally owned system of street railways, and in the exercise of the power, to condemn and purchase cable, electric and other railways within the limits of the city, is sufficiently broad to permit the condemnation of a street railway already devoted to the public use, as well as its franchises, although no specific mention is made of railways in active operation nor of the franchises of the railways mentioned. *State ex rel. Peabody v. Superior Court* 593
7. SAME—PROPERTY SUBJECT—STREET RAILWAYS—LOCATION—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 8005, authorizing a city to condemn street railways within such city, authorizes the condemnation of such portions of a street railway as lie within the city limits, although the road is partly within and partly without the city and is operated as a unit, and may damage property outside the city; since it is a necessary incident of the powers granted, and since the city must make compensation for all property damaged whether within or without the city. *State ex rel. Peabody v. Superior Court* 593
8. EMINENT DOMAIN—BY CITIES—PRIORITY. As between two cities seeking to condemn the same land, the one first in time is first in right. *Chehalis v. Centralia*..... 673

EMINENT DOMAIN—CONTINUED.

9. **SAME—COMPENSATION—NAVIGABLE WATERS—DIVERSION—RIGHTS OF RIPARIAN OWNERS.** The state being the owner of the beds of navigable rivers, under the constitutional assertion of art. 17, § 1, riparian owners are not, in eminent domain proceedings to establish a waterway district, entitled to damages from the fact that the state will divert the course of the stream and leave their property without access to the water. *Newell v. Loeb*..... 182
10. **SAME—STREET RAILWAYS—COMPENSATION—"IN MONEY"—STATUTES—CONSTRUCTION.** An ordinance providing for condemnation of parts of a street railway within the city for a municipal street railway system, and directing the board of public works to arrange and grant common user rights over the acquired track for that portion of the railway not condemned and outside of the city limits, in case the remaining portion is in suitable condition for operation after the condemned part is taken, does not violate Const., art. 1, § 16, requiring "full compensation" for property taken to be first "made in money;" especially where the common user rights to be granted are further shown not to have been intended as compensation by the proviso in the ordinance requiring such rights to be granted upon the basis and in the manner prescribed in the charter, which requires the railway company to pay for the common user rights granted by contributing a fair proportion of the cost and maintenance expense. *State ex rel. Peabody v. Superior Court*..... 593
11. **SAME.** In condemnation for a municipal street railway, under such act and ordinance, the city is restricted in the granting of common user rights to the charter requirement of contribution for a fair proportion of the cost and maintenance expense; and hence could not release to the railway company common user rights over the acquired tracks, for the purpose of having the jury consider such rights in making up their award of damages. *State ex rel. Peabody v. Superior Court*..... 593
12. **EMINENT DOMAIN—BY CITIES—PREREQUISITES—ORDINANCE—SUFFICIENCY.** Under Rem. & Bal. Code, § 7769, providing that a city desiring to condemn land shall provide therefor by ordinance, an ordinance providing for the submission of a plan or intent to acquire a gravity water system, containing a recital that it is proposed to acquire the necessary lands by purchase or condemnation, and describing the location of a proposed dam and intake, sufficiently manifests an intent to condemn land, as against another city seeking to condemn the same land; since the statutes are to be strictly construed only as against the owners of the land, and the law does not require any formal direction to the city attorney to institute condemnation proceedings. *Chehalis v. Centralia* 673
13. **SAME—PROCEEDINGS—PETITION—DESCRIPTION OF PROPERTY.** Under Rem. & Bal. Code, § 7771, requiring a reasonably accurate descrip-

EMINENT DOMAIN—CONTINUED.

- tion, a petition in condemnation proceedings is not fatally defective in that the description of the property did not close, where it was sufficient to identify the property, and the same was properly described in the decree; accuracy only in the decree being essential. *Chehalls v. Centralia*..... 673
14. EMINENT DOMAIN—PROCEEDINGS—PARTIES—NECESSARY DEFENDANTS. In a proceeding to condemn, for a municipally owned street railway system, the tracks and property of a railroad company which is in the actual possession of receivers, the receivers are necessary parties defendant whose presence is essential to a valid order of condemnation. *State ex rel. Peabody v. Superior Court*..... 593
15. SAME—STREET RAILWAYS—PROCEEDINGS—APPRAISAL—TENDER—SUFFICIENCY. In condemnation for a municipal street railway, it cannot be claimed that the prerequisite appraisal of the property of the street railway company sought to be condemned, and the city's offer to purchase, was in form only and not in good faith, where the railway company made no objection to the appraisal at the time of its submission, and submitted no corrected appraisal, as it was authorized to do by the ordinance. *State ex rel. Peabody v. Superior Court*..... 593
16. SAME—PROCEEDINGS—DEFENSES. In condemnation proceedings for a city to acquire lands for a storage reservoir for a water system, it is no defense that, pending the trial, another city had acquired the rights of lower riparian owners, especially where it was not sought to condemn such riparian rights; since the acquisition of such rights did not confer the right to divert the waters for municipal purposes. *Chehalls v. Centralia*..... 673
17. SAME—PROCEEDINGS—PROVINCE OF COURT AND JURY. In proceedings to acquire the right to flood lands by the erection of a dam for a power site, when there is no evidence of damage on account of loss of motive power, or on account of damages to the land not taken, it is not error to withdraw those questions from the jury. *Washington Water Power Co. v. Abacus Association*..... 455
18. EMINENT DOMAIN—WATERWAYS—PROCEEDINGS—JURY TRIAL—CHALLENGES. In a special proceeding to establish a waterway district, all the defendants must join in peremptory challenges to jurors, since the special law does not provide for peremptory challenges, and the general statutes require all defendants to join. *Newell v. Loeb* 182
19. EMINENT DOMAIN—WATERWAY DISTRICTS—PROCEEDINGS—JURY TRIAL—BENEFITS—DETERMINATION. Upon the assessment of benefits by a jury in a condemnation proceeding to establish a waterway district, in which there are thousands of party defendants, it is not error to permit the estimates of the witnesses to be taken by the jury

EMINENT DOMAIN—CONTINUED.

- to the jury room, under instructions that they were but aids to their recollection of the testimony and not to be considered as evidence. *Newell v. Loeb*..... 182
20. EMINENT DOMAIN—PROCEEDINGS—INSTRUCTIONS—EFFECT OF VIEW. In eminent domain proceedings, an instruction to the jury on the subject of their view of the premises, properly stating the effect thereof in weighing and applying the evidence, is not erroneous in that the jury were told that "what they see they know." *Newell v. Loeb* 182
21. EMINENT DOMAIN—RIGHTFUL POSSESSION—EJECTMENT—STAY TO PERMIT CONDEMNATION PROCEEDINGS. Upon ejectment to oust a common carrier of water from a right of way which it was using by permission, the suit is properly stayed for thirty days to allow the defendant to bring a condemnation suit to acquire the right of way. *Engstrom v. Edendale Land Co.*..... 658
22. SAME—STAY—DAMAGES. In such a case, it is error to assess the plaintiff's damages for the trespass at \$50, to be paid at once, irrespective of the damages to be ascertained in the condemnation proceedings, which will cover all damages. *Engstrom v. Edendale Land Co.* 658
23. SAME—PROCEEDINGS—ASSESSMENTS—BENEFITS—SEPARATE TRIALS. 3 Rem. & Bal. Code, § 8166a *et seq.*, providing for the establishment of waterway districts, does not authorize separate trials upon the question of the maximum benefits to the property in the district. *Newell v. Loeb*..... 182
24. SAME—ASSESSMENT OF BENEFITS—RAILROAD PROPERTY. The fact that a railroad right of way is at present being used exclusively for railroad purposes is no objection to its assessment for benefits from the establishment of a waterway district. *Newell v. Loeb*..... 182
25. SAME—ASSESSMENT OF BENEFITS—DETERMINATION. Under 3 Rem. & Bal. Code, § 8177-2, requiring the jury in condemnation proceedings to establish a waterway district, to find the maximum amount of benefits per acre or per lot, the jury must determine the maximum benefits to platted and unplatted property at the time of the trial; hence cannot make deductions for streets that might be platted in the future. *Newell v. Loeb*..... 182
26. SAME—BENEFITS—ASSESSMENT—DETERMINATION—PROCEEDINGS. 3 Rem. & Bal. Code, § 8177-2, requiring the jury to find the maximum amount of benefits from the establishment of a waterway district, merely fixes a basis for and limitations upon the assessment to be made later, and hence is not objectionable in that the amount of benefits found greatly exceed the cost of the improvement. *Newell v. Loeb* 182

EMINENT DOMAIN—CONTINUED.

27. **EMINENT DOMAIN—DAMAGES—SPECIAL BENEFITS—OFFSET.** In eminent domain proceedings by a city, in which the damages are to be paid from the general fund, benefits may be offset against the damages, under the express provisions of Rem. & Bal. Code, § 7782. *In re Queen Anne Boulevard*..... 91
28. **SAME—BENEFITS—OFFSET.** Benefits may be offset against the damages on condemnation of property by a city at the expense of the general fund, without violating any constitutional rights of the property owner. *In re Queen Anne Boulevard*..... 91
29. **SAME—BENEFITS—OFFSET—EVIDENCE—ADMISSIBILITY.** Benefits may be offset against the damages on condemnation of property by a city at the expense of the general fund, although the benefits resulted from improvements to follow which were not provided for in the condemnation ordinance, where competent evidence established the nature and extent of such improvements with reasonable certainty, and that they would be completed within a reasonable time, and that the two proceedings constituted one united object. *In re Queen Anne Boulevard*..... 91
30. **SAME—ADJUDICATION—CONCLUSIVENESS—MATTERS CONCLUDED.** The condemnation of land for a boulevard, is not an adjudication affecting the right of the city to offset benefits in subsequent condemnation proceedings to acquire additional rights incident to the improvement of the boulevard. *In re Queen Anne Boulevard*..... 91
31. **SAME—BENEFITS—OFFSET—APPORTIONMENT.** In offsetting benefits against damages in eminent domain proceedings by a city, only the special benefits peculiar to particular property can be considered, and there can be no question as to the apportionment of the benefits between separate properties. *In re Queen Anne Boulevard*... 91
32. **SAME—DAMAGES—BENEFITS — OFFSET—EVIDENCE — ADMISSIBILITY.** Upon the question of the amount of benefits to be offset against the damages in eminent domain proceedings by a city, it is competent to show the amounts which would have been chargeable against the property upon a special assessment plan for the same improvement. *In re Queen Anne Boulevard*..... 91
33. **SAME—BENEFITS—OFFSET—SEPARATE TRACTS.** Benefits to one lot cannot be offset against the damages due to the same owner for injury to a contiguous lot; hence it is error to treat two lots as one tract of land, where they were unoccupied and not used in common, and each was of sufficient size to admit of separate use; whether their use and situation made them in fact one parcel, being a question for the jury, unless there is no room for different opinions. *In re Queen Anne Boulevard*..... 91
34. **SAME—PROCEEDINGS—APPEAL—REVIEW—VERDICT.** In eminent domain proceedings to establish a waterway district, the jury's ver-

EMINENT DOMAIN—CONTINUED.

dict as to the amount of benefits will not be disturbed where supported by evidence, although the same was strongly contradicted. *Newell v. Loeb*..... 132

35. **EMINENT DOMAIN—RIGHTS ACQUIRED — RESTRICTION — LIMITATION BY STIPULATION.** In proceedings to condemn land along a river, to be flooded by the erection of a dam for a power site, it is not error to allow the petitioners to file a stipulation limiting the proceedings to the acquisition of the right to flood the land, allowing defendants to retain all other rights thereto. *Washington Water Power Co. v. Abacus Association*..... 455

EMPLOYEES:

See MASTER AND SERVANT.

Contracts for employment, see CONTRACTS, 2, 6-8.

ENFORCEMENT:

Of contempt proceedings for payment of alimony, see DIVORCE, 5.

ENTRY:

Of proposed amendment on journals, see CONSTITUTIONAL LAW, 1.

EQUITY:

See CANCELLATION OF INSTRUMENTS; FRAUDULENT CONVEYANCES;
QUIETING TITLE; SPECIFIC PERFORMANCE.

Form of action, see ACTION, 1.

ESTABLISHMENT:

Of boundary, see BOUNDARIES.

Of waterway district, see EMINENT DOMAIN, 5, 9, 18, 19, 23-26, 34;
NAVIGABLE WATERS, 2.

Grade of street, see MUNICIPAL CORPORATIONS, 5.

Of alley by prescription, see MUNICIPAL CORPORATIONS, 28.

ESTIMATES:

Taking witness' estimates of benefits to jury room, see EMINENT DOMAIN, 19.

ESTOPPEL:

Of bank by knowledge of officers, see BANKS AND BANKING, 1.

Of shipper to deny knowledge of release clause in contract, see CARRIERS, 9.

Of corporation on sale of stock, see CORPORATIONS, 3.

To assert dedication, see DEDICATION, 3.

EVIDENCE:

See CANCELLATION OF INSTRUMENTS; EMBEZZLEMENT.

Performance of laborer's contract to clear land, see AGRICULTURE.

EVIDENCE—CONTINUED.

- Objections for purpose of review, see **APPEAL AND ERROR**, 2, 4.
- Harmless error in rulings on, see **APPEAL AND ERROR**, 24-26.
- Review on appeal, see **APPEAL AND ERROR**, 34.
- To overcome presumption of valuable consideration, see **BILLS AND NOTES**, 2.
- Establishment of boundary, see **BOUNDARIES**, 2, 3.
- In action for fraud of broker, see **BROKERS**, 2.
- Of unlawful discrimination in rates, see **CARRIERS**, 2.
- For personal injuries, see **CARRIERS**, 12.
- Contempt proceedings, see **CONTEMPT**, 1.
- For breach of contract, see **CONTRACTS**, 6, 7.
- In criminal prosecutions, see **CRIMINAL LAW**, 1, 3.
- To show intent to dedicate, see **DEDICATION**, 2.
- Of cruelty ground for divorce, see **DIVORCE**, 1.
- Of contempt in failing to pay alimony, see **DIVORCE**, 4, 5.
- Of larceny by embezzlement, see **EMBEZZLEMENT**, 3.
- Condemnation proceedings, see **EMINENT DOMAIN**, 29, 32.
- Negligence in setting off blast, see **EXPLOSIVES**, 2.
- Of fraud, sufficiency, see **FRAUD**, 1.
- To show collateral promise within statute of frauds, see **FRAUDS, STATUTE OF**, 1.
- Community nature of property, see **HUSBAND AND WIFE**, 3.
- For recovery of premises demised, see **LANDLORD AND TENANT**, 1.
- Damages for breach of contract to lease building, see **LANDLORD AND TENANT**, 7, 8.
- For injuries to servant in general, see **MASTER AND SERVANT**, 2-4, 6, 8.
- Comment on by judge, see **MASTER AND SERVANT**, 5.
- Establishment of street grade, see **MUNICIPAL CORPORATIONS**, 5.
- Excessive assessment for improvement, see **MUNICIPAL CORPORATIONS**, 23.
- For personal injuries in city street, see **MUNICIPAL CORPORATIONS**, 32-34.
- Of agent's authority, see **PRINCIPAL AND AGENT**, 1.
- On submission of agreed case, see **SUBMISSION OF CONTROVERSY**.
- Excessive assessment for taxation, see **TAXATION**, 3.
- To show usury, see **USURY**, 2.

1. **EVIDENCE—VALUES.** That land had been valued in a trade at a certain sum is not sufficient evidence of its value. *Hay v. Boggs*. 329
2. **EVIDENCE—RES GESTÆ—ADMISSIBILITY.** Since the trial court may exercise a discretion in excluding matters pertaining to the *res gestæ* which are not closely related to the principal fact in question, it is not reversible error in an action for assault and battery, to exclude evidence of plaintiff's conduct after the assault had been completed and defendant had started away. *Matsuda v. Hammond*. 120
3. **EVIDENCE—CONSTRUCTION OF CONTRACT—EXPERTS—CONCLUSION OF WITNESS.** In an action for breach of contract of carriage of a bag-

EVIDENCE—CONTINUED.

gage car of a theatrical company, whether the original contract of carriage of the advance agent was merged in a subsequent contract made by the traveling manager, is a conclusion to be drawn by the jury; and it is therefore error to allow a witness, assuming to speak as an expert as to the powers of theatrical agents, to give his conclusion that there would be such a merger. *Auditorium Theatre Co. v. Oregon-Washington R. & Nav. Co.*..... 277

4. **EVIDENCE—EXPERTS—OPINIONS—VALUE.** Where expert witnesses on land values qualified on direct examination, their testimony was competent, lack of qualifications disclosed on cross-examination going only to the weight of the evidence. *Newell v. Loeb*..... 182

EXAMINATION:

Of expert witnesses, see **EVIDENCE**, 3, 4.

EXCEPTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 4.

EXCESSIVE ASSESSMENT:

See **MUNICIPAL CORPORATIONS**, 23; **TAXATION**, 3.

EXCESSIVE DAMAGES:

See **DAMAGES**, 6-11.

For assault by fellow passenger, see **CARRIERS**, 13.

Ground for new trial, see **NEW TRIAL**, 3.

EXECUTION:

Revocation by execution of subsequent will void under statute of frauds, see **WILLS**, 2.

EXEMPTIONS:

Of damages in lease, see **LANDLORD AND TENANT**, 4.

EXPENSES:

As element of damages, see **DAMAGES**, 3.

EXPERT TESTIMONY:

Harmless error in admission of, see **APPEAL AND ERROR**, 26.

In civil actions, see **EVIDENCE**, 3, 4.

EXPLOSIVES:

Liability for acts of independent contractor in setting off blast, see **MASTER AND SERVANT**, 12.

1. **EXPLOSIVES—INJURIES TO THIRD PERSONS—NEGLIGENCE—COMPLAINT—SUFFICIENCY.** A complaint alleging the setting off of a blast, without notice, near plaintiff's residence in a populous city, causing a terrific explosion throwing dust into plaintiff's eyes, states a cause

EXPLOSIVES—CONTINUED.

of action for negligence, although the acts are not characterized as negligent. *Britz v. Houlehan*..... 506

2. **EXPLOSIVES—BLASTING—INJURIES TO THIRD PERSONS—NEGLIGENCE—EVIDENCE—PRIMA FACIE CASE.** In an action for setting off a blast in a populous city, near plaintiff's residence, evidence that the blast was set off without notice and injured the plaintiff establishes a *prima facie* case, casting upon the defendant the burden of showing the exercise of due care. *Britz v. Houlehan*..... 506

EXTENSION:

Time for filing statement of facts, see **APPEAL AND ERROR**, 10, 11.

EXTRADITION:

1. **EXTRADITION—INTERSTATE—REQUISITES.** Under the U. S. Const., art. 4, § 2, and U. S. Rev. Stat. § 5278, providing for interstate extradition of fugitives from justice, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled, and the demand must be accompanied by a copy of the indictment or an affidavit made before a magistrate charging the commission of a crime, which copy must be certified to be by the executive of the demanding state. *Thorp v. Metzger*..... 62
2. **EXTRADITION—INTERSTATE—WARRANT—SUFFICIENCY.** An executive warrant for the extradition of a fugitive from justice need not define the crime with which the accused is charged, where it recites that he was charged with a crime, and was accompanied by the certified copy of the indictment or the charge made before a magistrate, as required by the act of Congress. *Thorp v. Metzger*..... 62

FALSE IMPRISONMENT:

1. **FALSE IMPRISONMENT—ACTION—DEFENSES—JUDGMENT OF CONVICTION—ACQUIESCENCE IN.** An action for false imprisonment under a judgment and conviction for contempt cannot be maintained where plaintiff took no appeal from the judgment or sought to review it in any way, but confessed its validity by paying the fine imposed. *Pierce v. Mitchell*..... 453

FARMS:

Situs of property connected with farm, for purpose of taxation, see **TAXATION**, 2.

FEES:

See **WITNESSES**.

FILING:

Statement of facts, see **APPEAL AND ERROR**, 6.
Initiative measures, time for, see **STATUTES**, 2, 3.

FINAL JUDGMENT:

Appealability, see **APPEAL AND ERROR**, 1.

FINDINGS:

Necessity of exceptions for review of, see **APPEAL AND ERROR**, 4, 7.

Review of, see **APPEAL AND ERROR**, 19-22.

By court in civil actions, see **TRIAL**, 1.

Special findings by jury, see **TRIAL**, 2.

FLIGHT:

Of defendant, see **CRIMINAL LAW**, 2.

FORBEARANCE:

Note given to prevent action, consideration for, see **BILLS AND NOTES**, 1.

FORCIBLE ENTRY AND DETAINER:

See **LANDLORD AND TENANT**, 1, 2.

FORECLOSURE:

Of laborer's liens, see **AGRICULTURE**.

Of lien, see **MECHANICS' LIENS**.

Of mortgage, see **MORTGAGES**.

Of tax lien, see **TAXATION**, 4-7.

FORFEITURE:

Of contract by vendor, see **VENDOR AND PURCHASER**, 2-4.

FORGERY:

1. **FORGERY—CERTIFICATE OF IDENTIFICATION—INFORMATION—SUFFICIENCY.** Under Rem. & Bal. Code, § 2583, with reference to the forgery of any "writing or instrument for the identification of a person," an information for the forgery of a certificate of identification of a workman on a railroad, showing on its face that it is such an identification certificate and one specifically prohibited to be forged, need not contain any extrinsic averments showing in what manner it was capable of being used; especially where it shows on its face that, if accepted as true by a disbursing agent empowered to issue pay checks, it might work a fraud upon the agent or the company. *State v. Smith*..... 441

FORMS OF ACTION:

See **ACTION**.

FRANCHISE:

Condemnation of street railway and franchise by city, see **EMINENT DOMAIN**, 6.

FRAUD:

See **FORGERY**; **FRAUDULENT CONVEYANCES**.

Of broker, see **BROKERS**.

Cancellation of deed for fraud, see **CANCELLATION OF INSTRUMENTS**.

Vacation of decree for fraud, see **DIVORCE**, 2.

Agent, see **PRINCIPAL AND AGENT**, 3.

As defense to performance of contract, see **SPECIFIC PERFORMANCE**.

Sales of realty, see **VENDOR AND PURCHASER**, 5.

1. **FRAUD—MISREPRESENTATIONS—LOCATION OF PROPERTY—EVIDENCE—SUFFICIENCY.** A verdict for damages for fraud is sustained where it appears that plaintiff and defendant were friends, and plaintiff was induced to trade store fixtures and goods worth \$300 for defendant's lot, on defendant's false representations that the lot was located close to the Tacoma tide flats, and worth \$300, when in fact it was two miles from that location and of no value and plaintiff was unable to make any investigation except to inquire the value of lots in the location described. *Lamb v. Levy*..... 511
2. **FRAUD — MISREPRESENTATIONS — MEASURE OF DAMAGES — INSTRUCTIONS.** The measure of damages for false representations as to the strength of the walls of a building sold to plaintiff, is the difference between what the building was actually worth at the time of the sale, and what it would have been worth if as represented; and it is error to instruct that the measure is the sum which it would have been necessary to expend to make the walls as represented. *Hunt v. Allison*..... 58

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—AGREEMENT TO PAY DEBT OF ANOTHER—DIRECT OR COLLATERAL PROMISE—EVIDENCE—SUFFICIENCY.** A promise is shown to be a collateral one, and within the statute of frauds, Rem. & Bal. Code, § 5289, relating to a special promise to answer for the debt of another, where it appears that plaintiff, on selling and delivering certain goods delivered to one N, to whom the promise was made, could not give a clear and consistent statement of the transaction, testifying that defendant told him to deliver the goods to N, and "the account would be taken care of;" to "go ahead and sell and we will see you get the money;" and "that is all he said, for me to furnish N the stuff and they would pay the bill," and that they would "take care of the account;" especially where the parties, in their correspondence, treated it as N's account; since every statement except the third is clearly collateral. *Pressentin v. Hawkeye Timber Co.* 388
2. **FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT.** A contract authorizing an agent to purchase real estate, is not within the provision of the statute of frauds, requiring a contract employing a broker to sell real estate for a commission to be in writing. *Stewart v. Preston*..... 559

FRAUDS, STATUTE OF—CONTINUED.

3. **FRAUDS, STATUTE OF—ORAL CONTRACT TO MAKE WILL.** An oral agreement between husband and wife to make wills whereby each left all property to the other, is within the statute of frauds, and void. *McClanahan v. McClanahan*..... 138
4. **SAME—PART PERFORMANCE—WILLS.** The execution of a will is not such part performance of an oral contract to leave property to another as to take the contract out of the operation of the statute of frauds. *McClanahan v. McClanahan*. 138

FRAUDULENT CONVEYANCES:

1. **FRAUDULENT CONVEYANCES—FRAUD OF WIFE—LIABILITY OF VENDEE—ISSUES AND PROOF.** In an action by a divorced wife to set aside a fraudulent transfer by her husband in which it appears that the fraudulent vendee had disposed of part of the premises to an innocent purchaser, judgment should be given against the vendee for the value of the property sold; and it is immaterial that the pleadings made no issue as to such part, where the issues went to the whole tract, and it appeared for the first time at the trial that part had been sold. *Hay v. Boggs*..... 329

GARNISHMENT:

1. **GARNISHMENT—LIABILITY OF GARNISHEE—CONTINGENT OR UNMATURED DEBTS—RENTS TO FALL DUE.** Where rent under a written lease has been paid to a judgment debtor for the current month in advance, the tenant cannot be held as a garnishee for installments of rent falling due after service of the garnishee process, under Rem. & Bal. Code, § 698, providing that a garnishee may be held if indebted to the principal defendant and such indebtedness has not matured and is not yet due and payable, the same to be paid into court when due; since this only covers indebtedness existing at the time of the garnishment, and a covenant to pay future installments of rent is too uncertain and contingent to be a present absolute indebtedness within the meaning of the statute. *Barkley v. Kerfoot* 556

GRADE:

Change in grade of street, see **MUNICIPAL CORPORATIONS**, 5, 14, 15.

GUARDIAN AND WARD:

Guardianship of insane persons, see **INSANE PERSONS**.

HABEAS CORPUS:

1. **HABEAS CORPUS—RETURN—DEMURRER.** In a habeas corpus to release a prisoner, a demurrer to the officer's return admits all the allegations thereof. *Thorpe v. Metzger*..... 62

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 23-30.

HEARING:

Upon application for order prohibiting live stock to run at large,
see **ANIMALS**, 2.

On submission of agreed case, see **SUBMISSION OF CONTROVERSY**, 2.

HIGHWAYS:

1. **HIGHWAYS—CONTRACT FOR GRADING COUNTY ROAD—LIABILITY FOR CHANGE OF GRADE—RIGHTS OF ABUTTERS—CONSTRUCTION OF CONTRACT.** A contract whereby a railroad company, standing in the situation of a compensated contractor, agreed with a county to grade a street, in accordance with plans furnished by and under the direction of the county, "at its own expense and without cost or charges" to the county, contemplates only the expenses, costs, and charges of making the grade conform to the plans and specifications; and hence does not include the damages to abutting owners by reason of the change of grade, after the street had been included within city limits and the contract taken over or assumed by the city; especially since, at the time the contract was entered into, the land was outside the city limits and the parties contracted with reference to the rule in this state that the county was not liable to abutters for damages from a change of grade. *Ettor v. Tacoma*..... 267
2. **HIGHWAYS—NEGLIGENT USE—AUTOMOBILES—ACTION FOR DAMAGES—INSTRUCTIONS.** In an action for personal injuries sustained when plaintiff's horse took fright from defendant's automobile, consideration of the charges of negligence (1) in running the automobile at an excessive speed, (2) cutting out the muffler, and (3) trying to pass on the wrong side, is not excluded by an instruction to the jury that the only acts of negligence on which there was any evidence are first, on the question whether defendant failed to stop on signal and, second, whether the defendant on first discovering the fright of the horse, failed to act as a reasonably prudent man should have acted, and failed to reduce the speed and failed to use reasonable care etc. *Yttregard v. Young*..... 523

HOMESTEAD:

1. **HOMESTEAD—FOR SUPPORT OF MINOR CHILDREN—RESTRICTIONS—STATUTES—CONSTRUCTION.** The homestead to be set aside, under Rem. & Bal. Code, § 1465, for the use of the widow and minor children of the deceased, where he, in his lifetime, failed to select one, cannot be awarded from his separate property to his children in fee, there being no widow; since the land descends to his lawful heirs, subject to debts and the children's rights, which would be the same as the widow would have taken had she filed a declaration, and since the court is only authorized to set aside a homestead for the widow and children "for a limited period," with an allowance for support. *In re Hedemark's Estate*..... 525

HUSBAND AND WIFE:

See DIVORCE.

Oral agreement between to make wills, see FRAUDS, STATUTE OF, 3, 4.
Conveyance in fraud of wife, see FRAUDULENT CONVEYANCES.

Parties for specific performance of contract to convey community property, see SPECIFIC PERFORMANCE, 2.

1. **HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—ADVANCES BY HUSBAND—COMMUNITY PROPERTY.** The status of the wife's separate real property is not affected by the fact that the husband put some of his money into it for repairs and upkeep, except as subject to a possible equity therefor, which should be disregarded when the amount was small, and was advanced without any understanding that it carried an interest in the property. *In re Deschamps' Estate* 514
2. **SAME—WIFE'S SEPARATE PROPERTY—TRADE—RIGHTS OF HUSBAND.** The fact that the wife's separate real estate was traded for property and her husband named as a grantee in the deed, would not give him a community interest in the property, even if he furnished a small amount of property in the trade, where it was apparent that he did not regard the property as his own. *In re Deschamps' Estate* 514
3. **SAME—COMMUNITY PROPERTY—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to show that property, the deed to which was taken in the name of a husband and wife, was their community property, where it is undisputed that the greater part of the consideration was a trade for separate real estate belonging to the wife, the husband furnishing property of very little value, without any agreement for an interest, and there was nothing to show that the wife, in directing the deed to be made to herself and husband, intended to give up a half interest in the property or that the husband should assert a greater interest than that represented by his advances. *In re Deschamps' Estate* 514

IMPAIRING OBLIGATION OF CONTRACT:

See CONSTITUTIONAL LAW, 2.

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See FALSE IMPRISONMENT.

Habeas corpus, see HABEAS CORPUS.

IMPROVEMENTS:

Public improvements, see MUNICIPAL CORPORATIONS, 5-19, 22, 23, 26, 27.

INDEMNITY:

See PRINCIPAL AND SURETY.

INDEPENDENT CONTRACTORS:

See MASTER AND SERVANT, 12.

INDIANS:

1. INDIANS—LANDS—ALLOTMENT—PATENTS—RESTRICTION UPON ALIENATION. A patent to an Indian containing no restriction upon alienation cannot be held to be the second patent conveying the land free from restrictions, which, under 23 Stat. 96, is to be issued after expiration of the twenty-five year period, where such period could not have expired when the patent was issued; since there is no authority to waive the limitation. *Felix v. Yaksum*..... 519
2. SAME—ALIENATION—RESTRICTIONS — EVIDENCE — SUFFICIENCY. A judgment declaring a parol gift by an Indian of land held subject to a restriction against alienation cannot be sustained on appeal, in the absence of anything in the record to show to what tribe the Indian belonged or when or under what law he made his homestead application, so as to determine what restrictions apply. *Felix v. Yaksum* 519
3. INDIANS—ALLOTMENT—PERSONAL PROPERTY—ALIENATION. An Indian in the Indian country cannot alienate personal property purchased by the United States for the Indian with proceeds of the sale of an allotment which was not subject to alienation, the United States having received the purchase price and retained title as trustee, thereby manifesting an intent that the proceeds of the allotment shall have the same legal status as the allotment itself; it resting with the United States to say when the trust shall be relinquished. *Rider v. LaClair*..... 483
4. INDIANS—ALLOTTED LAND—CONTRACTS—MORTGAGE OR SALE OF CROPS—VALIDITY. Since the acts of Congress declaring contracts relative to, or claims growing out of, an Indian's land void unless approved by the Indian agent, do not apply to crop mortgages, under Rem. & Bal. Code, § 3659, making a crop mortgage a chattel, an Indian may mortgage a growing crop on his allotment or sell a crop of hay stacked thereon, in view of the absence of any express statutory prohibition and the present policy of the government to encourage agriculture and business pursuits; but whether the mortgage may enter before severance, or to foreclose, in the absence of departmental order, is not decided. *Rider v. LaClair*..... 483
5. INDIANS—INDIAN COUNTRY—"TRADERS"—LICENSES. A person engaged in the business of merchandising in a town outside of an Indian reservation, the Indian title to which has been extinguished, is not a "trader" in the Indian country, requiring a license under 3 Fed. St. Ann. § 2127. *Rider v. LaClair*..... 483
6. INDIANS—CONTRACTS—"SALES" OF CATTLE—CHATTEL MORTGAGES—VALIDITY. 3 Fed. Stat. Ann. § 2127, providing that all sales of cattle by an Indian in the Indian country to others than members of his

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tribe are void, except with the written consent of the agent of the tribe, liberally construed in favor of the Indian, covers chattel mortgages. *Rider v. LaOlaire*..... 488

INDICTMENT AND INFORMATION:

See **FORGERY**.

1. **INDICTMENT AND INFORMATION—SUFFICIENCY—LANGUAGE OF STATUTE.** An information charging the crime of larceny by a bailee, pledgee or trustee, substantially in the language of the statute, Rem. & Bal. Code, § 2601, is sufficient. *State v. Jakubowski*..... 78

INFANTS:

See **PARENT AND CHILD**.

Custody and support on divorce of parents, see **DIVORCE**, 6.

Setting aside homestead for support of children, see **HOMESTEAD**.

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION**.

INITIATIVE MEASURES:

Time for filing with secretary of state, see **STATUTES**, 2, 3.

INJUNCTION:

Public improvements, see **MUNICIPAL CORPORATIONS**, 15.

Time to apply for change of judges in action for, see **VENUE**, 3.

INSANE PERSONS:

1. **INSANE PERSONS—GUARDIANS—APPOINTMENT—DISCRETION.** It is not an abuse of discretion to refuse to appoint a brother, in preference to a stranger, as the guardian of an insane person, where it appears that there had been a misappropriation of his estate, and the property would probably not be recovered if the brother had been appointed. *In re Martenson*..... 36

INSOLVENCY:

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In criminal prosecutions, see **CRIMINAL LAW**, 2; **EMBEZZLEMENT**, 2.

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INTENT:

Proof of intent to dedicate, see **DEDICATION**, 2.

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Election to declare mortgage due for nonpayment of interest, see **MORTGAGES**.

INTERROGATORIES:

To jury, see **TRIAL** 2.

INTERSTATE COMMERCE:

Compulsory installation of side track connections as interference with, see **RAILROADS**, 3.

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See **EXTRADITION**.

IRRIGATION:

Condemnation of property for public use, see **EMINENT DOMAIN**, 4, 21, 22.

JOINDER:

Of causes of action, see **ACTION**, 2.

Of challenges to jurors, see **JURY**.

JUDGES:

Contempt proceedings, see **CONTEMPT**.

Comment on evidence, see **MASTER AND SERVANT**, 5.

Change of venue for bias of, see **VENUE**.

1. **JUDGES—DISQUALIFICATION—STATUTES—TIME FOR CHALLENGE.** Under Rem. & Bal. Code, § 209, disqualifying a judge who had "been counsel for either party in the action or proceeding" a trial judge is not disqualified from the fact that before going on the bench his law firm had represented one of the parties in other matters; especially where the challenge was not made until after the respondent had rested his case. *Fortson Shingle Co. v. Skagland*..... 3

JUDGMENT:

Review, see **APPEAL AND ERROR**.

Condemnation proceedings, see **EMINENT DOMAIN**, 30.

Avoiding original assessment as bar to reassessment, see **MUNICIPAL CORPORATIONS**, 24.

Vacation of, see **SUBMISSION OF CONTROVERSY**, 2.

1. **JUDGMENT—VACATION—GROUNDS—ERROR OF LAW.** A valid judgment cannot be vacated by the trial court for error of law, which can be reviewed only on appeal. *Morgan v. Williams*..... 343

JURISDICTION:

Award of damages in equitable suit, see **ACTION**, 2.

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Process to support, see **PROCESS**.

JURY:

- Right to jury trial, see **ACTION**, 1.
- Instructions in criminal prosecutions, see **CRIMINAL LAW**, 2.
- Peremptory challenge to jurors in condemnation proceedings, see **EMINENT DOMAIN**, 18.
- View of premises, see **EMINENT DOMAIN**, 20.
- Disqualification or misconduct ground for new trial, see **NEW TRIAL**, 2, 3.
- Instructions in civil action, see **TRIAL**, 3, 4.
- Submission of special interrogatories to, see **TRIAL**, 2.

1. **JURY — PEREMPTORY CHALLENGE — STATUTORY RIGHT.** Defendants sued jointly for tort must join in their peremptory challenges, even when their interests are antagonistic, under Rem. & Bal. Code, § 324, providing that either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it is made; since their right of peremptory challenge is purely statutory, and must be exercised in the manner granted. *Grandall v. Puget Sound Traction, Light & Power Co.*..... 37

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- Of shipper as to release clause in contract of shipment, see **CARRIERS**, 9.

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- In rescission of contract of sale, see **VENDOR AND PURCHASER**, 1.

LANDLORD AND TENANT:

- Liability of tenant as garnishee for rents to fall due, see **GARNISHMENT**.
- Liability of agent upon election to hold owner liable for injury to goods, see **PRINCIPAL AND AGENT**, 2.

1. **LANDLORD AND TENANT — UNACCEPTED LEASE — TENANCY FROM MONTH TO MONTH—EVIDENCE—SUFFICIENCY.** In an action of forcible entry and detainer, findings to the effect that the premises were not held under a written lease, and that the lessee was a tenant from month to month, are sustained where it appears that a former written lease had been made and abrogated by mutual consent before the tenant took possession, that the landlord executed a second lease, containing conditions, which to be binding, required the tenant's formal consent, but was not executed or otherwise consented to by him and was never delivered. *Corner Market Co. v. Gillman*... 625
2. **SAME—TENANCY FROM MONTH TO MONTH—NOTICE TO QUIT.** A tenant from month to month cannot be ousted by an action of forcible entry and detainer, under Rem. & Bal. Code, § 812, unless notice to quit be served at least twenty days prior to the end of the period. *Corner Market Co. v. Gillman*..... 625

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3. LANDLORD AND TENANT—DEFECTIVE PREMISES—PROMISE TO REPAIR—LIABILITY OF LESSOR. Where the landlord has made a promise to repair known defects in the premises, the tenant is absolved from the assumption of risks therefrom while remaining for a reasonable time awaiting performance of the promise, if not guilty of contributory negligence. *Lowe v. O'Brien*..... 677
4. LANDLORD AND TENANT—LEASE—CONDITIONS—EXEMPTION OF DAMAGES—NEGLIGENCE OF LESSOR—LIABILITY. A provision in a lease of a storeroom that the lessee shall hold the lessor harmless from all damages by reason of accidents on the premises or the bursting of pipes, above, upon, or about the building or any damage occasioned by water, or the acts or neglect of cotenants, only includes the damages expressly waived, and does not excuse an injury occasioned by the negligence of the landlord. *LeVette v. Hardman Estate*..... 320
5. SAME—DEFECTIVE PREMISES—DAMAGES TO TENANT—NEGLIGENCE OF LANDLORD—EVIDENCE—QUESTION FOR JURY. The negligence of the lessor of a storeroom on the ground floor of a hotel building, in failing to control and keep the upper stories in a condition of reasonable safety, is for the jury, where it appears that the upper tenant moved out, and the upper part of the building was broken into several times and a washstand torn out, leaving a water pipe broken, the water having been turned off; and, upon renting a vacant house in the rear connected with the same water service pipe, the lessor had the water turned on without making an investigation of the upper stories, whereby the water escaped and damaged the lessee's goods in the storeroom. *LeVette v. Hardman Estate*..... 320
6. LANDLORD AND TENANT—CONTRACT TO LEASE—BREACH—MEASURE OF DAMAGES. Upon breach of a contract to lease by refusing to accept the building, the action is entire, and the owner's measure of damages is his loss, if any, by reason of the difference between the entire rent reserved and the entire rental value for the term at the time of the breach. *Oldfield v. Angeles Brewing & Malting Co.*..... 158
7. SAME—BREACH—DAMAGES—EVIDENCE—ADMISSIBILITY. In an action for breach of a contract to enter into a lease, which provided that the lessee should not engage in any unlawful business, the fact may be shown that the building was within 300 feet of an armory, and therefore could not be leased for saloon purposes, under Rem. & Bal. Code, § 7229. *Oldfield v. Angeles Brewing & Malting Co.* 158
8. SAME—DAMAGES—EVIDENCE—ADMISSIBILITY. In an action for breach of a contract to lease a building for a term of years, by refusing to accept the building, plaintiff cannot show the rental value at the time of the breach by showing that the rental value had decreased from year to year. *Oldfield v. Angeles Brewing & Malting Co.* 158

LANDS:

Indian lands, see INDIANS, 1-4.

LARCENY:

See CRIMINAL LAW, 1-5; EMBEZZLEMENT.

Charging offense in language of statute, see INDICTMENT AND INFORMATION.

1. **LARCENY—DRIVING CATTLE FROM RANGE—ESSENTIALS OF OFFENSE—INSTRUCTIONS.** Upon a prosecution, under Rem. & Bal. Code, § 2605, subd. 4, for the larceny of one head of neat cattle by unlawfully taking it from a range or pasture, the jury should be instructed that it was essential to prove that the animal was taken or driven away from a range or pasture. *State v. Crossen*..... 438
2. **LARCENY—DEFENSES—CLAIM OF TITLE—INSTRUCTIONS.** In a prosecution for the larceny of "one head of neat cattle," from a range or pasture, in which the defense was that the accused had bought a calf of an Indian, and drove in and butchered the animal in question supposing it was the one he had bought, it is error to refuse to instruct as to the defense of Rem. & Bal. Code, § 2608, providing that it is a defense to a prosecution for larceny "that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable." *State v. Crossen* 438

LAW OF THE CASE:

See APPEAL AND ERROR, 31-36.

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LIBEL AND SLANDER:

1. **LIBEL AND SLANDER—WORDS LIBELOUS PER SE—WHAT CONSTITUTES.** Newspaper articles plainly intended to bring a person into public hatred, contempt, or ridicule, are libelous *per se*, although not attacking him in his business or profession, or charging him with an infamous crime. *Wells v. Times Printing Co.*..... 171
2. **SAME—WORDS LIBELOUS PER SE—SPECIAL DAMAGES—PLEADING—COMPLAINT—SUFFICIENCY.** Newspaper articles are libelous *per se* without alleging special damages, where they falsely and maliciously charge plaintiff with the violation of a statute defining the public desecration or disrespect of the United States flag, and calls him a "redtinted agitator" voicing "constructive sedition and treason" and wantonly "insulting the symbol of patriotic allegiance," and declaring that there was a public clamor for his prosecution; and the com-

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plaint in such case requires no innuendo to construe the same as intending to bring him into public hatred, contempt and ridicule.
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LICENSES:

For "traders" in Indian country, see **INDIANS**, 5.

LIENS:

See **MECHANICS' LIENS**.

Laborer's liens, see **AGRICULTURE**.

Mortgage, see **CHATTEL MORTGAGES; MORTGAGES**.

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Of assessment district, see **MUNICIPAL CORPORATIONS**, 17, 18.

Duty to instruct as to limit of recovery to amount alleged, see **TRIAL**, 4.

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Of rights acquired in condemnation proceedings, see **EMINENT DOMAIN**, 35.

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LIQUIDATED DAMAGES:

On breach of contract, see **VENDOR AND PURCHASER**, 4.

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LOGS AND LOGGING:

Condemnation of right of way for logging road, see **EMINENT DOMAIN**, 3.

Navigability of stream for forest products, see **NAVIGABLE WATERS**, 1.

MACHINERY:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 1, 2.

MANDATE:

To lower court on decision on appeal, see **APPEAL AND ERROR**, 39, 40.

MARRIAGE:

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MARRIED WOMEN:

See **HUSBAND AND WIFE**.

MASTER AND SERVANT:

Liens for labor and material, see **MECHANICS' LIENS**.

1. **MASTER AND SERVANT—DEFECTIVE APPLIANCE—SIMPLE TOOLS—DEFECTS—REPAIRS—ASSUMPTION OF RISKS.** A clamp, similar to an ordinary clevis, used as a block on the rails to hold a steam shovel, is a simple tool, within the rule that an adult employee assumes the risks from simple tools in his exclusive use; hence plaintiff, who constantly used the clamp and frequently had it repaired, cannot recover for an injury sustained when a small piece of metal broke off the clamp key, when hit with a hammer, owing to the fact that a piece of hard steel had been welded into the key in repairing it when soft steel should have been used. *Bougas v. Eschbach-Bruce Co.* 347
2. **SAME—NEGLIGENCE—APPLIANCES—SIGNAL SYSTEM—EVIDENCE—SUFFICIENCY.** In an action for personal injuries sustained by a miner being elevated out of the mine, when the signal service failed to work, the negligence of the master in failing to maintain a safe appliance for signals is for the jury, where it appears that the bell cord was slack and without sufficient supports, so that, when three bells were given in the mine, the first pulls were not sufficient to ring the bell, and but one bell was rung, causing the engineer to mistake the signal and so run the elevator as to injure the plaintiff, and that this condition was known to the foreman for some time. *Johansen v. Pioneer Mining Co.* 421
3. **SAME—EMPLOYMENT OF NEGLIGENT FOREMAN—EVIDENCE—REPUTATION—ADMISSIBILITY.** In an action for injuries caused by the employment of a negligent foreman, it is admissible to show numerous specific independent acts of negligence on the part of the foreman together with a general reputation for carelessness. *Johansen v. Pioneer Mining Co.* 421
4. **MASTER AND SERVANT—INJURY TO SERVANT—EMPLOYMENT OF NEGLIGENT FOREMAN—EVIDENCE—SUFFICIENCY.** The negligence of a mine owner in employing and retaining a careless and negligent foreman is a question for the jury, where there was evidence that the foreman had, on several occasions, been negligent in his work and had a general reputation for carelessness in and about the mine and where he had previously worked. *Johansen v. Pioneer Mining Co.* 421

MASTER AND SERVANT—CONTINUED.

5. **SAME—EMPLOYMENT OF INCOMPETENT SERVANTS—INSTRUCTIONS—COMMENT ON FACTS.** Upon an issue as to the employment of an incompetent foreman an instruction that, where a servant had been in the master's employ for a long time, the master is charged with knowledge of the servant's general reputation as to carelessness or incompetency, is proper and not an unlawful comment on the evidence, where it was conceded that the servant had been in his employ for a long time. *Johansen v. Pioneer Mining Co.*..... 421
6. **MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** The negligence of the owner of a foundry, in removing one step of a ladder on the side of the building, and allowing a portion of the framework of the building to take its place, but which was too large to be grasped by the hands, is not sufficiently established, where the only evidence of its removal was the statement of the plaintiff, who testified that the ladder was in perfect condition a year and a half before the accident, and he did not notice the defective condition until just before he fell, after having used the ladder many times each day, and six or seven times previously on the day of the accident, there being no evidence that any one else was on the ladder after he had last used it; since he either assumed the risks, or if the step was removed after he last used it, the master had no notice thereof. *Dahl v. Puget Sound Iron & Steel Works* 126
7. **MASTER AND SERVANT—SAFE PLACE—ASSUMPTION OF RISKS.** A servant who made daily use for a year and a half of a perpendicular ladder nailed to the side of a building assumes the risks from improper construction of the ladder or want of sufficient light, or from the fact that the ladder was perpendicular, throwing great weight on the hands. *Dahl v. Puget Sound Iron & Steel Works*.. 126
8. **SAME—ASSUMPTION OF RISKS—UNSAFE WAYS—EVIDENCE—SUFFICIENCY.** A miner, riding out of the mine on top of the elevator, as directed by the foreman, does not assume the risk from having adopted a perilous way out, when he might have adopted a safe way by climbing a ladder, where it was customary for men to ride out on the elevator, in which case it was stopped at the surface, and it would not have been dangerous if the elevator had been stopped at the surface according to the signal given, and the plaintiff did not know of the danger. *Johansen v. Pioneer Mining Co.*..... 421
9. **MASTER AND SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS.** A laborer on street paving work does not assume the risk, and is not guilty of contributory negligence, in obeying the order of a foreman to hold the tongue and attempt to guide a concrete mixer, which it was supposed could be moved under its own power, but which could only be moved by a team, where he was not familiar with the machine; since it was the

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- duty of the foreman to look out for his safety and he had a right to rely upon the orders and superior knowledge of the foreman. *Magnuson v. MacAdam*..... 289
10. **SAME—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS.** A miner in riding out of the mine when going to lunch is still under the direction of the foreman, and where he rode on top of the elevator in obedience to orders of the foreman, he is not guilty of contributory negligence, unless the danger was so glaring and apparent that a reasonably prudent man would have refused to obey the order. *Johansen v. Pioneer Mining Co.*..... 421
11. **MASTER AND SERVANT—LIABILITY FOR TORTS OF SERVANT—SCOPE OF EMPLOYMENT.** The general manager of a produce commission business acts outside of the scope of his employment, where, in attempting to collect for goods supposed to have been wrongfully taken, he committed an assault and battery upon a customer whom he charged with larceny. *Matsuda v. Hammond*..... 120
12. **MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—INDEPENDENT CONTRACTORS—EXPLOSIVES.** A railroad company employing an independent contractor to excavate in a public street in the business section of a populous city by blasting with dynamite, is liable to third persons through the negligence of the contractor in blasting; since the work is inherently and intrinsically dangerous, liability for which cannot be evaded by entering into an independent contract. *Freebury v. Chicago, Milwaukee & Puget Sound R. Co.*... 464

MATERIALMEN:

Right of employees of to lien for work, see **MECHANICS' LIENS**, 2, 5.

MATERIALS:

Lien for materials furnished on work, see **MECHANICS' LIENS**, 5.

MATURITY:

Of payments under profit sharing agreement, see **CONTRACTS**, 4.

MEASURE OF DAMAGES:

See **DAMAGES**, 1-3, 6-11.

For fraud, see **FRAUD**, 2.

For breach of contract to lease building, see **LANDLORD AND TENANT**, 6.

Instructions as to, see **TRIAL**, 4.

MECHANICS' LIENS:

Liability of owner for through acts or admissions of architect, see **PRINCIPAL AND AGENT**, 1.

1. **MECHANICS' LIENS—PROPERTY LIENABLE—SEPARATE INTERESTS.** Where several parties were interested in the real estate, which was

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under contract of sale, only the interests of the purchasers are subject to a mechanics' lien for work done under a contract made by the purchasers. *Chavelle v. Island Gun Club*..... 304

2. MECHANICS' LIENS—PERSONS ENTITLED—SUBCONTRACTOR OR MATERIALMEN—LABORERS EMPLOYED BY MATERIALMEN—STATUTES—CONSTRUCTION. One who contracts to furnish, from his own screening plant, at so much per yard, all the sand and gravel needed for cement work by a contractor on an irrigating canal, is not a subcontractor, but a materialman, and men employed by and looking to him for their pay are not entitled to a lien as laborers performing work on the canal; in view of the distinction between subcontractors and materialmen made by Rem. & Bal. Code, § 1129, giving liens to every person performing labor upon or furnishing materials to be used in the construction of the canal, at the instance of the owner or his agent, and making contractors, subcontractors etc. agents of the owner; since no lien is accorded to laborers of materialmen, who are not made agents of the owner. *Baker v. Yakima Valley Canal Co.* 70

3. MECHANICS' LIENS—PERSONS ENTITLED—"CONTRACTORS"—SUBCONTRACTORS—STATUTES—CONSTRUCTION. A subcontractor, a dredging company, furnishing a dredger and doing dredging work upon a dyke at so much per day, under an oral contract with the principal contractor, is entitled to a lien for the amount of his contract price, under Rem. & Bal. Code, § 1129, according a lien to every person performing labor or furnishing materials for certain structures (including dykes), and Id., § 1139, providing that the "contractor" shall be entitled to recover only the amount due on his contract, after deducting all other claims for labor performed or materials furnished, and Id., § 1141, classifying lien claimants, and fixing their rank or order of payment, as follows: (1) laborers, (2) materialmen, (3) subcontractors, and (4) contractors; since it was the intention to provide a lien for every person furnishing material going directly into the structure or performing labor upon it, and "contractor" is used in its generic sense and includes subcontractors as well as the principal contractors. *Chavelle v. Island Gun Club*..... 304

4. SAME—SUBCONTRACTORS—CONTRACTS—PAYMENT BY DAY. The fact that a subcontractor is to be paid by the day does not affect his right to a lien for the amount due according to the terms of his contract. *Chavelle v. Island Gun Club*..... 304

5. SAME—MATERIALMEN—NECESSITY OF NOTICE—SUBROGATION. Unpaid laborers working for a materialman could not be subrogated to the right of a materialman's lien, where no notice in writing was given to the owner of the furnishing of the materials as required by 3 Rem. & Bal. Code, § 1133. *Baker v. Yakima Valley Canal Co.*.. 70

MECHANICS' LIENS—CONTINUED.

6. **SAME—NOTICE OF LIEN—SUBCONTRACTORS.** Under Rem. & Bal. Code, § 1147, requiring the lien laws to be liberally construed, a subcontractor's notice of lien is not void by reason of failing to designate him as a subcontractor, *eo nomine*, where the facts alleged showed his relation. *Chavelle v. Island Gun Club*..... 304
7. **SAME—NOTICE—SUFFICIENCY.** A lien notice designating a gun club as the owner, is not fatally defective, where it was alleged that it was a voluntary association consisting of several persons who were named. *Chavelle v. Island Gun Club*..... 304
8. **SAME—SUBCONTRACTORS—AMOUNT OF CLAIM.** A subcontractor's lien for the amount due under the terms of his contract cannot be sustained for a sum in excess of the amount of the principal contract price. *Chavelle v. Island Gun Club*..... 304

MINES AND MINERALS:

Employees in mines, see **MASTER AND SERVANT**, 2-5, 8, 10.

MINIMUM WAGE:

For public work, see **MUNICIPAL CORPORATIONS**, 11-13, 26, 27.

MISREPRESENTATION:

See **FRAUD**.

By agent to principal, see **PRINCIPAL AND AGENT**, 3.

As defense to performance of contract, see **SPECIFIC PERFORMANCE**.

By vendor on sale of land, see **VENDOR AND PURCHASER**, 5.

MODIFICATION:

Of contract of carriage, see **CARRIERS**, 4.

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Tenancy from month to month, see **LANDLORD AND TENANT**, 1, 2.

MORTGAGES:

Personal property, see **CHATTEL MORTGAGES**.

By Indians, see **INDIANS**, 4, 6.

Service of process by publication, in action to foreclose mortgage, see **PROCESS**, 2.

1. **MORTGAGES — FORECLOSURE — INSTALLMENTS — NOTICE MATURING WHOLE DEBT.** Where there was no tender of interest overdue, an option in a mortgage to declare the whole mortgage due for nonpayment of interest is sufficiently exercised by the commencement of foreclosure proceedings. *Musselman v. Knottingham*..... 435

MOTIVE:

For crime, see **CRIMINAL LAW**, 1.

MUNICIPAL CORPORATIONS:

Taking property for public use, see EMINENT DOMAIN, 6-8, 10-16, 27-33.

Recall of elective officers, see OFFICERS.

1. MUNICIPAL CORPORATIONS—ANNEKXATION OF TERRITORY—EFFECT. The annexation of territory to a city *ipso facto* extends the authority of the city over the territory, under Rem. & Bal. Code, § 7449, providing that it shall thereupon be subject to all laws of the city. *Ettor v. Tacoma*..... 267
2. SAME—ANNEKXATION OF TERRITORY—EXTINGUISHMENT OF UNEXECUTED CONTRACTS. Upon the annexation of territory to a city, a contract by the county commissioners for the grading of a street in the territory annexed, not then executed, is extinguished where its execution would tend to defeat the rights of the city, and where the contract did not come within some guarantee of the constitution, unless it was acquiesced in and acted upon by the city. *Ettor v. Tacoma* 267
3. MUNICIPAL CORPORATIONS—ORDINANCE—PUBLICATION. Seattle city charter, art. 4, § 17, providing that all ordinances shall be published at least once in the city official newspaper within three days after the same becomes a law, is directory merely, and publication within a reasonable time (six days), is a sufficient compliance. *State ex rel. Peabody v. Superior Court*..... 593
4. SAME—ORDINANCES—SUBMISSION TO ELECTORS—BALLOTS. The submission of an ordinance providing for a municipal street railway for ratification by the electors is not invalidated by the fact that the proposition was not printed upon the general election ballots, as required at general elections, but upon separate ballots, where, although the election was held at the time of the general election and by the general election officers, it was in fact a specially called election, and the ballots would have been valid if the election had been held apart from the general election; especially where no legal voter was denied the right to freely express his will. *State ex rel. Peabody v. Superior Court*..... 593
5. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CHANGE OF GRADE—LIABILITY—EVIDENCE—SUFFICIENCY. A city establishes a grade, which it cannot thereafter change without paying for the consequential damages to abutting property, where by formal resolution and contract, it improved the street by clearing and grading it to its full width and building a plank road with sidewalks on both sides; the presumption being that a grade was adopted, a formal ordinance establishing a grade not being necessary. *Thorberg v. Hoquiam*..... 679
6. SAME—IMPROVEMENTS—PERMANENCY. A plank roadway sixteen feet wide must be presumed to be a permanent and not a temporary

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- improvement, where the work was done on the special assessment plan and the cost charged to property in the district, and where the intent to grade the street was clearly manifest. *Thorberg v. Hoquiam* 679
7. MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROCEEDINGS — RESOLUTIONS—SUFFICIENCY. A resolution for a sewer improvement, stating an intention to improve a certain portion of a designated street by the construction of a trunk sewer outlet at an estimated specified cost, that the cost is to be assessed against the property which can be conveniently drained into the sewer and included in an assessment district thereafter to be established, and the time and place for making protests, substantially complies with a charter provision requiring the resolution to state the nature of the improvement, the estimated costs, the portion of the cost to be borne by benefited property, and the time and place for presenting protests. *Allen v. Bellingham* 469
8. SAME—RESOLUTION—OBJECTIONS—JURISDICTION. Where an opportunity is given to present objections to an assessment roll, the failure of the initiatory resolution to meet all the requirements of the law, if the same might have been dispensed with by the legislature, does not defeat the jurisdiction of the council to levy the assessment. *Allen v. Bellingham*..... 469
9. SAME—PUBLIC IMPROVEMENTS—CONTRACTS—METHOD—PUBLIC BIDS. Under Rem. & Bal. Code, §§ 7507, 7560, and 7567, providing that cities of the first class may provide for making local improvements to be paid for by special assessments, to determine what work shall be done in whole or in part at the expense of the property benefited, and to provide for the manner of making and collecting the assessments, the city is not required to let the contracts upon competitive bids, in the absence of any statute or charter requirement so directing. *Malette v. Spokane*..... 205
10. SAME—PUBLIC IMPROVEMENTS—CONTRACTS—RATIFICATION — ACQUIESCENCE IN CONTRACT ON ANNEXATION OF TERRITORY. Upon the annexation of territory to a city, the city may acquiesce in an unexecuted contract made by the county commissioners for the grading of a street, where it was not *ultra vires*, and might have been made by the city; and such a contract will be deemed ratified by the city and the improvement adopted as a proper municipal improvement, although not recognized by an affirmative act by the city council, where the work was allowed to go on under the supervision of the city engineer, and with knowledge of the commissioner of public works and of the street committee of the city council, without anything being done to stop it. *Ettor v. Tacoma*..... 267
11. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—WAGES — MINIMUM WAGE—AUTHORITY TO FIX. The legislative body of a city of the

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- first class has the power to prescribe a higher rate of wages than the prevailing rate, as a minimum of wages to be paid for common labor on public work to be paid for by special assessments against property specially benefited, in view of Const., art. 11, §§ 10, 11, conferring the largest measure of local self government compatible with the general authority of the state, and Rem. & Bal. Code, §§ 7518 and 7507, conferring general authority to exercise all usual powers, whether specified or not, and to make all regulations necessary for the preservation of health and good order in its limits. *Malette v. Spokane* 205
12. SAME—IMPROVEMENTS—MINIMUM WAGE—ORDINANCE—VALIDITY—PUBLIC POLICY. An ordinance prescribing a higher rate of wages than the prevailing rate, as a minimum of wages to be paid for common labor on public work to be paid for by special assessments against property specially benefited, is not contrary to any public policy of the state, even if it increases the cost of the work. *Malette v. Spokane*..... 205
13. SAME—PUBLIC IMPROVEMENTS—ORDINANCES—MINIMUM WAGE—REASONABLENESS. There is a presumption of the reasonableness of an ordinance prescribing a higher rate of wages than the prevailing rate, as a minimum of wages to be paid for common labor on public work to be paid for by special assessments against property specially benefited; and taking notice of existing conditions and circumstances and the increased cost of living during the past few years, the courts cannot say that an ordinance is unreasonable in fixing a minimum wage of \$2.75 per day for common laborers on street improvement work, payable from special assessments upon property benefited. *Malette v. Spokane*..... 205
14. MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES TO ABUTTERS—LIABILITY OF CONTRACTOR. A railroad company, grading a city street, in consideration of the vacation of certain streets, in accordance with plans furnished and under the direction of the city, stands in the situation of a compensated contractor, and is not liable to abutting owners for damages on account of the change in grade, where there was no claim that the work was negligently done or not in accordance with the plans. *Ettor v. Tacoma*..... 267
15. SAME—IMPROVEMENTS—LIABILITY FOR CHANGE OF GRADE—REMEDIES OF OWNER—INJUNCTION—DAMAGES. Where property owners permitted a city to prosecute street improvement work until it was nearly completed, they cannot enjoin the work on the ground that they had not been paid damages by reason of a change of grade; their only remedy being recovery of the damages at law. *Thorberg v. Hoquiam* 679
16. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—DISTRICTS—PROPERTY INCLUDED—"PLATTED PROPERTY"—STATUTES—CON-

MUNICIPAL CORPORATIONS—CONTINUED.

- STRUCTION.** Under 3 Rem. & Bal. Code, § 7892-13, providing that the assessment district shall include all property between the termini of said improvement abutting upon, adjacent, vicinal or proximate to the street improved, to a distance back to the center line of the block, and in case the property is unplatted, the distance back shall be the same as that included in the assessment of the platted lands immediately adjacent thereto, the term "block" was intended to refer to a square included by four streets as located by the prevailing scheme of streets in the locality; and "platted" property refers to that included by the regularly placed intersecting streets where the lands are capable of being platted; and "unplatted" lands refers to lands not so included; hence, where the next street to the north had been dedicated through only part of the abutting lands, the other portion of such lands is "unplatted," if capable thereof, and cannot be assessed back further than the immediately adjoining platted property, which extended back only half way to the next street. *Steyer & Sons Co. v. Spokane*..... 282
17. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT DISTRICTS—POWER TO FIX LIMITS.** The legislature has power to provide, as in Rem. & Bal. Code, § 7790, that a city directing a public improvement may, in the initiatory ordinance, fix the limits of the assessment district, and that the same shall be conclusive on the commissioners; and the action of the city thereunder is legislative in character and beyond the control of the courts. *In re Eighth Avenue Northwest* 570
18. **SAME—BENEFITS—ASSESSMENTS—LIMIT.** The power of the city, under Rem. & Bal. Code, § 7790, to fix the limits of an assessment district does not authorize a levy of the whole cost of the improvement upon the district, regardless of benefits; in view of Const., art. 7, § 9, providing that the city may make local improvements by special assessment of property benefited, and clearly intending to limit the assessments to the amount of the benefits. *In re Eighth Avenue Northwest*..... 570
19. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT OF BENEFITS—SEPARATE MATTERS.** Where a street one hundred and fifty feet wide was condemned, one-half of the width being for an elevated road to connect two bluffs and one-half for a road on the surface for the use of and exclusively benefiting lowlands in the valley between the bluffs, there are in fact two separate improvements, and it is error to assess part of the cost of the one against property benefited only by the other, especially where no more favorable contract or price was obtained for the land by reason of the fact that it was condemned as part of one improvement. *In re West Wheeler Street, Seattle* 3
20. **SAME—BENEFITS—ASSESSMENTS—APPORTIONMENT—RESTRICTIONS.** Under Rem. & Bal. Code, § 7790, providing that no property shall

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- be assessed more than it is actually benefited, and *Id.*, § 7795, providing that if property has been assessed more or less than its proportionate share, the court shall determine the proper amount and give judgment accordingly, property cannot be assessed in a greater amount than its relative benefit; hence, where the city has fixed an assessment district excluding lands that are benefited, the commissioners must take into consideration the benefit accruing thereto, and charge the lands within the district with only such proportions of the cost as corresponds to their proportion of the benefits, even if the assessment district was actually benefited to the full extent of the cost. *In re Eighth Avenue Northwest*. 570
21. **SAME—BENEFITS—ASSESSMENTS—APPORTIONMENT—METHOD.** The assessment of lands within an assessment district for the total cost of an improvement, is arbitrary and upon a fundamentally wrong basis, where the commissioners testified that other land outside the district was also benefited, and would have been included in the assessment if it had been included in the district. *In re Eighth Avenue Northwest*..... 570
22. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—BENEFITS—APPORTIONMENT—APPEAL—REVIEW OF ASSESSMENT.** Where, in providing for an improvement, to be paid for by special assessment upon property specially benefited, the council provided that any part of the costs not properly assessed against benefited property shall be paid for from the general fund, the superior court on appeal from the assessment, has power to apportion the costs between the city and property owners, and is not bound by the apportionment of the eminent domain commission. *In re Leary Avenue, Seattle* 399
23. **SAME—BENEFITS—ASSESSMENTS—EXCESSIVENESS—EVIDENCE—SUFFICIENCY.** An assessment for benefits is excessive where lands within the assessment district were assessed in a sum sufficient to cover the entire cost of the improvement, and the commissioners testified that land outside the improvement district was also benefited and would have been assessed for part of the cost if it had been included in the district, and the only other witnesses testified that the property was assessed grossly in excess of the benefits, one of them testifying that it was not benefited at all. *In re Eighth Avenue Northwest* 570
24. **SAME—REASSESSMENT—BAR—JUDGMENT AVOIDING ORIGINAL ASSESSMENT.** A judgment declaring an assessment roll void, is not *res judicata* of the right to make a reassessment, so as to bar a reassessment, which is expressly authorized by 3 Rem. & Bal. Code, § 7892-21. *Allen v. Bellingham*..... 469
25. **SAME—ASSESSMENT—REJECTION—EFFECT—POWER TO REASSESS.** The making of a reassessment roll, which was rejected by resolution

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and a new roll directed, does not exhaust the power of the council to proceed under the reassessment ordinance; the power not being exhausted until a roll had been prepared and confirmed or the ordinance repealed. *Allen v. Bellingham*..... 469

26. SAME—IMPROVEMENTS—ASSESSMENTS—PUBLIC OR PRIVATE WORK—AGENCY OF CITY—MINIMUM WAGE. In the improvement of streets, at the expense of the property specially benefited, a city does not act in its proprietary capacity or as an agent of the owner whose property is assessed to pay for the work, so as to make the work private work and not subject to the minimum wage law provided for public work; but rather in its governmental capacity to open and improve streets, and as the agent of the law in letting the contract and collecting the assessment. *Malette v. Spokane*..... 205

27. SAME—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—CONTROL—MINIMUM WAGE. Street improvement work, to be paid for by special assessments, is public work, regardless of the mode of payment, and therefore within the control of the public authorities as to the minimum wages to be paid for common labor thereon. *Malette v. Spokane* 205

28. SAME—APPEAL—REVIEW—PRESUMPTIONS. Upon an appeal from a judgment modifying an assessment by eminent domain commissioners, any presumption would be in favor of the judgment. *In re Leary Avenue, Seattle*..... 399

29. MUNICIPAL CORPORATIONS—ALLEYS—ESTABLISHMENT—PRESCRIPTION. An open, continuous, adverse user by the public for a period of twenty years or more, of an alley fenced off by the owner through a block connecting two public streets, makes the same a public alley by prescription. *Humphrey v. Krutz*..... 152

30. SAME—ALLEYS—OBSTRUCTION—RIGHTS OF ABUTTERS. Abutting owners have such an interest in an alley that they may maintain an action to enjoin its threatened obstruction. *Humphrey v. Krutz* 152

31. SAME—ALLEYS—THREATENED OBSTRUCTION—ACTIONS—ISSUES. Where an answer in an action to enjoin the obstruction of an alley admits that defendants claim title in fee simple and intend to exclude the plaintiffs therefrom, the testimony of a defendant who had not forbidden its public use does not change the issues or show that its obstruction was not threatened. *Humphrey v. Krutz*..... 152

32. SAME—DEFECTS IN STREETS—LIABILITY OF CONTRACTOR—EVIDENCE—SUFFICIENCY. A street contractor doing the cement work in a street is not liable for an injury sustained by a pedestrian by reason of an offset of six inches in a temporary board sidewalk at a street intersection, where he had done no work in the sidewalk area and it did not appear who had constructed the board walk. *Lautenschlager v. Seattle*..... 12

MUNICIPAL CORPORATIONS—CONTINUED.

33. MUNICIPAL CORPORATIONS—STREETS—DEFECTIVE SIDEWALKS—NEGLIGENCE OF CITY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The negligence of a city in maintaining a temporary sidewalk six inches lower than the cement walk with which it connected at a street intersection, is for the jury, where it appears that the temporary walk had been so maintained for several months, that the street lights were so placed as to cast a shadow upon the offset, and the street was not closed to travel, and no warnings were posted; since it was the duty of the city to close the street or take reasonable precautions where it undertakes to improve a street. *Lautenschlager v. Seattle*..... 12
34. SAME—STREETS—DEFECTIVE SIDEWALKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. The contributory negligence of a pedestrian in falling at night at a street intersection, or in failing to take a safer way, is for the jury, where there was a drop of six inches from a cement sidewalk to a temporary board walk, where improvements were in progress, no warnings were posted, and the street lights were so placed as to throw a shadow obscuring the offset, and the walk on the other side of the street had obstructions and red lights hung out; since a traveler may use any street that is open for travel. *Lautenschlager v. Seattle*..... 12

NAMES:

Naming children in will, see WILLS, 1.

NAVIGABLE WATERS:

As boundaries, see BOUNDARIES.

Rights of riparian owners to damages on diversion of stream, see EMINENT DOMAIN, 9.

- 1.. NAVIGABLE WATERS—STREAMS—NAVIGABILITY. A stream is navigable, where during freshets regularly recurring during certain months, there was sufficient water, in its natural state, to float shingle bolts and forest products without using the banks of the stream; and it is immaterial that it was necessary to remove windfalls and artificial obstructions caused by logging the land to restore the stream to its natural state. *Fortson Shingle Co. v. Skagland* 8
2. NAVIGABLE WATERS—RIPARIAN RIGHTS—DIVERSION OF WATERS BY STATE—EMINENT DOMAIN—COMPENSATION. Riparian owners have no rights in the bed of a navigable stream, beyond their boundaries, and no rights in the waters of the river as against the state or its agency; hence a riparian owner is not entitled to recover damages from the establishment of a waterway district by reason of the diversion of the water and being compelled to procure a supply of water elsewhere. *Newell v. Loeb*..... 182

NAVIGATION:

See **NAVIGABLE WATERS**, 1.

NECESSITY:

For objections or exceptions for purpose of review, see **APPEAL AND ERROR**, 2-4.

For statement of facts for purpose of review, see **APPEAL AND ERROR**, 8, 9.

Notice to owner of material furnished, see **MECHANICS' LIENS**, 5.

NEGLIGENCE:

Of carrier, see **CARRIERS**, 10-13.

Measure of damages, see **DAMAGES**, 4-11.

In maintenance of high power transmission line, see **ELECTRICITY**.

Use of explosive, see **EXPLOSIVES**.

Of driver of automobile, see **HIGHWAYS**, 2.

Demised premises, see **LANDLORD AND TENANT**, 3-5.

Of employers, see **MASTER AND SERVANT**.

Contributory negligence of servant as question for jury, see **MASTER AND SERVANT**, 9, 10.

Defective sidewalk in city street, see **MUNICIPAL CORPORATIONS**, 32-34.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 33, 34.

Of person injured by operation of railroad, see **RAILROADS**, 5.

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.

NEWSPAPERS:

Libel, see **LIBEL AND SLANDER**.

NEW TRIAL:

Review of rulings on, see **APPEAL AND ERROR**, 15.

Decision on former trial as bar to grant of new trial for insufficiency of evidence, see **APPEAL AND ERROR**, 34.

1. **NEW TRIAL—MISCONDUCT OF COUNSEL—DISCRETION.** It is not an abuse of discretion to refuse a new trial on the ground of misconduct of counsel in commenting on the absence of one of the defendant's witnesses, where the case was reopened to allow an explanation of his absence, even though counsel again commented thereon. *Johanson v. Pioneer Mining Co.*..... 421
2. **NEW TRIAL—MISCONDUCT OF JURY—QUOTIENT VERDICT.** The rendition of a "quotient" verdict, in an action for damages, is not ground for a new trial, where it does not appear that the jurors had agreed in advance to be bound by the quotient, each having merely stated the amount he deemed proper, and after the quotient was ascertained, the requisite number agreeing to accept the same. *Loy v. Northern Pac. R. Co.*..... 25

NEW TRIAL—CONTINUED.

3. NEW TRIAL—MISCONDUCT OF JURY—EXCESSIVE VERDICT—REMEDIATION.

The trial court may grant a new trial, conditionally, unless part of an excessive verdict is remitted, even though it is found that, because of the size of the verdict, it was influenced by passion or prejudice. *Matsuda v. Hammond*..... 120

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

Of appeal, see **APPEAL AND ERROR**, 6.

To bank of adverse interest of officers, see **BANKS AND BANKING**, 1.

Record of mortgage as notice, see **CHATTEL MORTGAGES**.

To quit premises, see **LANDLORD AND TENANT**, 2.

To owner of furnishing material, see **MECHANICS' LIENS**, 5.

Of lien, see **MECHANICS' LIENS**, 6, 7.

Election to declare mortgage due for nonpayment of interest, see **MORTGAGES**.

Of action, see **PROCESS**.

OBJECTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 2-4, 11.

To assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 8.

OBLIGATION OF CONTRACT:

Laws impairing, see **CONSTITUTIONAL LAW**, 2.

OBSTRUCTIONS:

Of alley, see **MUNICIPAL CORPORATIONS**, 30, 31.

OFFICERS:

Bank officers, see **BANKS AND BANKING**, 1.

Corporate officers, see **CORPORATIONS**, 4.

Title of act submitting constitutional amendment for recall of elective officers, see **STATUTES**, 1.

1. OFFICERS — RECALL — STATUTES — RETROACTIVE LAWS — REMEDIES.

Since the amendment to the constitution of 1912, art. 1, §§ 33 and 34, and Laws 1913, p. 454 (3 Rem. & Bal. Code, § 4940-1 *et seq.*), enacted in pursuance thereof, relating to the recall of elective officers, expressly refers to officers of cities of the first class and are general laws on the subject, they supersede the recall provisions under the act of 1911. *Tabor v. Walla Walla*..... 579

OFFSET:

Of benefits against damages in condemnation proceedings, see **EMINENT DOMAIN**, 27-33.

OPINION EVIDENCE:

In civil actions, see EVIDENCE, 3, 4.

OPTION:

To declare mortgage due for nonpayment of interest, see MORTGAGES

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORDERS:

Prohibiting live stock to run at large, see ANIMALS, 2.

Review of, see APPEAL AND ERROR, 11.

ORDINANCES:

Providing for condemnation proceedings, see EMINENT DOMAIN, 12.

Municipal ordinances, see MUNICIPAL CORPORATIONS, 3, 4, 12, 13.

PARENT AND CHILD:

Custody and support of children on divorce, see DIVORCE, 6.

Setting aside homestead for support of children, see HOMESTEAD.

1. **PARENT AND CHILD—CUSTODY—WELFARE OF CHILDREN.** Where a divorced parent seeks to recover custody of children from persons holding under adoption proceedings, the dominant question is the moral, intellectual and material welfare of the children, and the wishes of the parent are subordinated thereto. *Viereck v. Sullivan* 313
2. **PARENT AND CHILD—DUTY TO SUPPORT—DIVORCE.** The duty of a father to provide support for his minor child cannot be escaped by obtaining a decree of divorce from his nonresident wife, ignoring the existence of the child. *Schoennauer v. Schoennauer*..... 132
3. **PARENT AND CHILD—ACTION FOR SUPPORT — DEFENSES — DIVORCE — EFFECT.** A decree of divorce on the ground that the wife had abandoned her husband, does not preclude a subsequent action by the wife to recover for the support of a minor child, where the complaint in divorce made no mention of the child and no steps were taken to give the court jurisdiction to make proper orders for its custody and support, or any disposition of the property rights of the parties. *Schoennauer v. Schoennauer*..... 132

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL DEDICATION:

See DEDICATION.

PARTIES:

See **SPECIFIC PERFORMANCE**, 2.

Entitled to benefit from reversal of judgment, see **APPEAL AND ERROR**, 38.

Entitled to condemn property, see **EMINENT DOMAIN**, 4.

Condemnation proceedings, see **EMINENT DOMAIN**, 14.

Persons entitled to mechanics' lien, see **MECHANICS' LIENS**, 2-4.

Right to sue, see **QUIETING TITLE**.

PASSAGE:

Of proposed amendment by legislature, see **CONSTITUTIONAL LAW**, 1.

PASSENGERS:

Carriage of, see **CARRIERS**, 10-13.

PATENTS:

To Indians, see **INDIANS**, 1.

PAYMENT:

Payment in property for corporate stock, see **CORPORATIONS**, 1, 2.

Of taxes as estoppel to assert dedication, see **DEDICATION**, 3.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 10, 11.

Agreement to pay debt of another, see **FRAUDS, STATUTE OF**, 1.

To subcontractors by day as affecting right to lien, see **MECHANICS' LIENS**, 4.

As releasing surety, see **PRINCIPAL AND SURETY**.

PENALTIES:

On breach of contract, see **CONTRACTS**, 6; **DAMAGES**, 1; **VENDOR AND PURCHASER**, 4.

PEREMPTORY CHALLENGES:

To jurors, see **JURY**.

PERFORMANCE:

See **SPECIFIC PERFORMANCE**.

Of laborers' contract to clear land, see **AGRICULTURE**.

Of contract, see **CONTRACTS**, 4-7.

Part performance of oral contract, see **FRAUDS, STATUTE OF**, 4.

Of land contract, see **VENDOR AND PURCHASER**, 3.

PERSONAL INJURIES:

To passenger, see **CARRIERS**, 10-13.

Damages for, see **DAMAGES**, 4-11.

Caused by explosives, see **EXPLOSIVES**.

To traveler on highway, see **HIGHWAYS**, 2.

To employee, see **MASTER AND SERVANT**, 1-10.

To person on city street, see **MUNICIPAL CORPORATIONS**, 32-34.

To person on or near railroad tracks, see **RAILROADS**, 5.

PETITION:

For vacation of decree for fraud, see **DIVORCE**, 2.
 In condemnation proceedings, see **EMINENT DOMAIN**, 13.
 Filing initiative petitions, see **STATUTES**, 2, 3.

PLEADING:

See **HABEAS CORPUS**; **LIBEL AND SLANDER**.
 Objections for purpose of review, see **APPEAL AND ERROR**, 3.
 Necessity of pleading offset, see **APPEAL AND ERROR**, 5.
 Harmless error in allowing answer containing new issue on second trial, see **APPEAL AND ERROR**, 23.
 Amendment of as directed on former appeal as depriving party of property without due process of law, see **CONSTITUTIONAL LAW**, 4.
 In action for negligence in blasting, see **EXPLOSIVES**.
 To set aside fraudulent conveyances, see **FRAUDULENT CONVEYANCES**.
 Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

1. **PLEADING—ANSWER—ARGUMENTATIVE DENIAL—REPLY.** Where new matter in an answer setting up defendant's version of the transaction amounts only to a denial of the complaint, a reply thereto is not necessary. *Wohlforth v. Kuppler*..... 339
2. **PLEADING—ISSUES AND PROOF—VARIANCE.** In an action for negligently setting off a blast in a brick yard and throwing brick dust into plaintiff's eyes, it is not a fatal variance that it was some other foreign substance, thrown by the blast, that injured plaintiff's eyes. *Britz v. Houlehan* 506

POWERS:

Of county commissioners, see **ANIMALS**, 2.
 Of city to condemn street railway, see **EMINENT DOMAIN**, 6, 7.
 Of city to fix minimum wage for public work, see **MUNICIPAL CORPORATIONS**, 11.
 To fix limit of assessment district, see **MUNICIPAL CORPORATIONS**, 17.
 To make reassessment, see **MUNICIPAL CORPORATIONS**, 24, 25.
 Of legislature to fix time for filing initiative measures, see **STATUTES**, 2.

PRACTICE:

See **APPEAL AND ERROR**; **CRIMINAL LAW**, 6, 7; **DAMAGES**; **EXTRADITION**; **NEW TRIAL**; **PLEADING**; **PROCESS**; **TRIAL**.
 Prosecution of actions in general, see **ACTION**.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 23-30.
 Of judge, see **JUDGES**.
 To surety by overpayments to contractor, see **PRINCIPAL AND SURETY**.

PREMISES:

Defective premises, see LANDLORD AND TENANT, 3-5.

PRESCRIPTION:

Establishment of alley, see MUNICIPAL CORPORATIONS, 29.

PRESUMPTIONS:

As to valuable consideration, see BILLS AND NOTES, 2.

On appeal from assessment proceedings, see MUNICIPAL CORPORATIONS, 28.

PRINCIPAL AND AGENT:

See BROKERS.

Liability of third persons for commissions of agent employed by brokers, see CONTRACTS, 2.

Corporate officers and agents, see CORPORATIONS, 4.

1. **PRINCIPAL AND AGENT—AUTHORITY OF AGENT—SUPERVISING ARCHITECT—EVIDENCE—SUFFICIENCY.** An owner having contracted with the principal contractor for all the work for the construction of a building, is not liable to a subcontractor, who, with notice of the principal contractor's default, failed to perfect his lien, but continued in the performance of his subcontract in reliance upon the statement of the supervising architect, in charge of the work, that the owner was holding up sufficient money to pay all subcontractors, and directing him to go ahead, in the absence of any evidence that the architect was authorized to bind the owner beyond the terms of the original contract, or that notice of his statement was brought home to the owner; since the architect has no implied authority to bind the owner beyond the terms of the contract. *Schanen-Blair Co. Marble & Granite Works v. Sisters of Charity of the House of Providence* 256
2. **PRINCIPAL AND AGENT—LIABILITY OF AGENT.** A tenant who dealt with a known owner and sought to hold the owner liable for injury to goods, cannot hold the owner's rental agent. *Le Vette v. Hardman Estate* 320
3. **PRINCIPAL AND AGENT—FRAUD—LIABILITY OF AGENT.** Where an agent misrepresents the price he had paid for land, thereby inducing his principal to pay an advanced price, the agent is liable to the principal for the difference in price. *Stewart v. Preston*..... 559

PRINCIPAL AND SURETY:

1. **PRINCIPAL AND SURETY—RELEASE OF SURETY—OVERPAYMENTS—PREJUDICE.** A compensated surety on a building contract is not prejudiced, and is therefore not released, by payments made during the progress of the work in excess of the amounts due the contractor, where they were necessary to protect the property from lien

PRINCIPAL AND SURETY—CONTINUED.

claims of laborers, the amounts of which were not questioned; nor by a small excess payment which was less than a credit afterward given for extra work. *Manhattan Co. v. United States Fidelity & Guaranty Co.* 405

2. **SAME—RELEASE OF SURETY—TAKING OVER WORK.** The payment of laborers on a building when the contractor was unable to pay them, is not a taking over of the work, where it was simply to protect the building from labor liens and the contractor was allowed to go on with the work. *Manhattan Co. v. United States Fidelity & Guaranty Co.* 405

PRIORITIES:

Condemnation proceedings, see **EMINENT DOMAIN**, 8.

PROCESS:

On appeal, see **APPEAL AND ERROR**, 6.

Summons in tax foreclosure, see **TAXATION**, 4-7.

1. **PROCESS—SUMMONS—BY PUBLICATION—MAILING COPIES—AFFIDAVIT OF PUBLICATION.** Upon a service by publication, a copy of the summons and complaint need not be mailed to the defendant's last known place of residence, where the affidavit for publication states that affiant does not know the place of residence of the defendant, in view of Rem. & Bal. Code, § 228, providing that the affidavit for publication shall recite that a copy of the summons and complaint has been deposited in the post office, directed to the defendant at his place of residence, unless it is stated that such residence is not known. *Musselman v. Knottingham*..... 435
2. **SAME—MAILING COPIES—DILIGENCE TO LOCATE DEFENDANT.** In an action to foreclose a mortgage, a service by publication is regular, without mailing a copy of the summons and complaint, where the defendant was not a resident of the county, diligent effort was made to locate him, both through the sheriff's and city marshal's offices, and publication was not commenced until shortly before the expiration of ninety days after filing the complaint, and the affidavit alleged that his residence was unknown. *Musselman v. Knottingham* 435

PROFITS:

Division of under contract for herding sheep, see **ANIMALS**, 1.

Construction of contract relating to "profits" earned, see **CONTRACTS**, 4.

Anticipated profits as element of damages, see **DAMAGES**, 2.

PROMISE:

Of landlord to repair known defects, see **LANDLORD AND TENANT**, 3.

To pay debt of another, see **FRAUDS, STATUTE OF**, 1.

PROMISSORY NOTES:

See **BILLS AND NOTES.**

PROPERTY:

Taking of without due process of law, see **CONSTITUTIONAL LAW**, 24.

Payment with for corporate stock, see **CORPORATIONS**, 1, 2.

Dedication to public use, see **DEDICATION.**

Easements in, see **EASEMENTS.**

Taking or damaging for public use, see **EMINENT DOMAIN.**

Subject to lien, see **MECHANICS' LIENS**, 1.

Included in assessment district, see **MUNICIPAL CORPORATIONS**, 16.

Assessment for taxation, see **TAXATION**, 1-3.

PROPOSAL:

Of amendment to constitution, see **CONSTITUTIONAL LAW**, 1.

PROVINCE OF COURT AND JURY:

In criminal prosecutions, see **CRIMINAL LAW**, 5.

In condemnation proceedings, see **EMINENT DOMAIN**, 17.

PUBLICATION:

Of ordinances, see **MUNICIPAL CORPORATIONS**, 3.

Service of process, see **PROCESS.**

Of summons in tax foreclosure, see **TAXATION**, 4-7.

PUBLIC IMPROVEMENTS:

By municipalities, see **MUNICIPAL CORPORATIONS**, 5-19, 22, 23, 26, 27.

PUBLIC POLICY:

Validity of ordinance fixing minimum wage on public work, see **MUNICIPAL CORPORATIONS**, 12.

PUBLIC SERVICE COMMISSION:

Regulation of rates, see **CARRIERS**, 1-3.

Compulsory installation of side track connection, see **RAILROADS**, 2.

PUBLIC USE:

Dedication of property, see **DEDICATION.**

Taking property for public use, see **EMINENT DOMAIN.**

Spur track as public use, see **RAILROADS**, 4.

PUNISHMENT:

For contempt, see **CONTEMPT**, 2.

Failure to pay alimony, see **DIVORCE**, 3-5.

QUESTION FOR JURY:

Promise to move scheduled trains on time, see **CARRIERS**, 5.

Duty to protect passenger from assault, see **CARRIERS**, 11.

Performance or breach of contract, see **CONTRACTS**, 7.

QUESTION FOR JURY—CONTINUED.

- In criminal prosecutions, see **CRIMINAL LAW**, 5.
- Negligent maintenance of high power transmission line, see **ELECTRICITY**.
- Contributory negligence of person killed by high power transmission line, see **ELECTRICITY**.
- Negligence of landlord, see **LANDLORD AND TENANT**, 5.
- In action for injury to servant, see **MASTER AND SERVANT**, 2, 4.
- Negligence causing injury from defect in sidewalk, see **MUNICIPAL CORPORATIONS**, 33, 34.
- Negligence of driver of team at railroad crossing, see **RAILROADS**, 5.

QUIETING TITLE:

1. **QUIETING TITLE—EASEMENTS—PARTIES—ABUTTERS.** Abutting owners may maintain an action to quiet title to an easement in an alley and to the fee which they hold subject to the easement. *Humphrey v. Krutz* 152

QUOTIENT VERDICT:

- Ground for new trial, see **NEW TRIAL**, 2.

RAILROADS:

- Carriage of goods and passengers, see **CARRIERS**.
 - As employers, see **MASTER AND SERVANT**, 12.
 - Taxation, see **TAXATION**, 3.
1. **RAILROADS—FACILITIES—SIDE TRACKS—DEMAND—SUFFICIENCY.** The sufficiency of a demand for side track connections cannot be questioned by a railroad company, where it appears that, after some correspondence, its general counsel absolutely refused to entertain further negotiations looking to the installation of any kind of a spur track at or near the point in question, and its division superintendent testified that he would not have recommended any kind of a spur there, and none would have been put in except on his recommendation, and no objection was made by the company to the form or sufficiency of the demand. *State ex rel. Chicago, Milwaukee & Puget Sound R. Co. v. Public Service Commission*..... 529
 2. **SAME—FACILITIES—SIDE TRACKS—COMPULSORY INSTALLATION—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.** The public service commission law, 3 Rem. & Bal. Code, §§ 8626-13, 8626-62, providing that, upon denial by a railroad company of a shipper's application for a switching connection, the public service commission, upon due hearing, may compel the company to provide, on its own right of way, at the cost of the shipper and others using it, a side track and switching connection if reasonably practicable and the business therefor is sufficient to justify it, is not unconstitutional as depriving the company of property without due process of law; since

RAILROADS—CONTINUED.

the spur is to be built entirely on land of the company held for public use, there is a full hearing, and the spur is to be paid for by others, and is open to the use of all shippers on reasonable terms. *State ex rel. Chicago, Milwaukee & Puget Sound R. Co. v. Public Service Commission* 529

3. **SAME—REGULATION—SIDE TRACKS—INTERFERENCE WITH INTERSTATE COMMERCE.** Whether an order of the public service commission requiring the installation of industrial side track connections interferes with interstate commerce is a question of fact, and it will not be so held where the evidence falls to show any appreciable effect upon interstate business, and it appears that the spur is reasonable and practicable, and can be operated with reasonable safety. *State ex rel. Chicago, Milwaukee & Puget Sound R. Co. v. Public Service Commission*..... 529

4. **SAME—PUBLIC USE—SIDE TRACKS.** A spur track intended primarily for the immediate use of a shingle shipper, open upon reasonable terms to the use of the public, is a public use. *State ex rel. Chicago, Milwaukee & Puget Sound R. Co. v. Public Service Commission* 529

5. **RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** It is not contributory negligence as a matter of law, for the driver of a team, waiting at a double track crossing for a freight train to pass south on the near track, to start to cross immediately after the last car had passed, where it appears that, at the point where he was waiting, he had a view of the approach of north-bound trains for a distance of nearly 700 feet, and he looked and neither saw nor heard a train, and the city speed limit for trains at that point was six miles an hour, and he was struck by a train going at least 10 miles an hour, after getting his horses across the far track. *Schwartz v. Northern Pac. R. Co.*..... 44

RATE:

Regulation of, see **CARRIERS**, 1-3.

RATIFICATION:

Of acts of corporate officers, see **CORPORATIONS**, 4.

Of unexecuted contract, upon annexation of territory, see **MUNICIPAL CORPORATIONS**, 10.

REAL ESTATE AGENTS:

See **BROKERS**.

REASSESSMENT:

See **MUNICIPAL CORPORATIONS**, 24, 25.

RECALL:

- Of elective officers, see OFFICERS.
- Of elective officers, title of act, see STATUTES, 1.

RECEIVERS:

- As necessary parties in condemnation proceedings, see EMINENT DOMAIN, 14.

RECORDS:

- On appeal, see APPEAL AND ERROR, 7-11.
- Necessity of recording, see CHATTEL MORTGAGES.
- Transcript and statement of facts on appeal, see CRIMINAL LAW, 6.

REDUCTION:

- Of verdict, see NEW TRIAL, 3.

REGULATION:

- Of common carriers by public service commission, see CARRIERS, 1-3.
- Of side track connections, see RAILROADS, 1-4.

REJECTION:

- Of assessment, effect, see MUNICIPAL CORPORATIONS, 25.

RELEASE:

- Of surety, see PRINCIPAL AND SURETY.

RELIANCE:

- By purchaser on representations of vendor, see VENDOR AND PURCHASER, 5.

REMAND:

- Of cause on appeal or writ of error, see APPEAL AND ERROR, 39, 40.

REMISSION:

- Of excess in verdict, see NEW TRIAL, 3.

RENEWAL:

- Of mortgage, see CHATTEL MORTGAGES, 2.

RENT:

- See LANDLORD AND TENANT, 6, 8.
- As property subject to garnishment, see GARNISHMENT.

REPAIRS:

- Promise of landlord to repair known defects, see LANDLORD AND TENANT, 3.

REPEAL:

- Of laws relating to recall of elective officers, see OFFICERS.

REPLY:

See PLEADING, 1.

REPRESENTATION:

Of bank by officers, see BANKS AND BANKING, 1.

REPUTATION:

Of foreman for carelessness, admissibility of evidence, see MASTER AND SERVANT, 3.

REQUESTS:

For instructions, see APPEAL AND ERROR, 29, 30.

RESCISSION:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of contract of sale, see SALES.

Of contract for sale of land, see VENDOR AND PURCHASER, 1, 2.

RES GESTAE:

In criminal prosecutions, see CRIMINAL LAW, 1.

In civil actions, see EVIDENCE, 2.

RES JUDICATA:

Judgment avoiding original assessment as bar to reassessment, see MUNICIPAL CORPORATIONS, 24.

RESOLUTION:

For public improvement, see MUNICIPAL CORPORATIONS, 7, 8.

RESTRICTION:

Upon alienation of property by Indian, see INDIANS, 1-3.

On assessment for benefit from improvement, see MUNICIPAL CORPORATIONS, 20.

RETENTION:

Of security for performance of contract, upon rescission by vendor, see VENDOR AND PURCHASER, 2, 4.

REVENUE:

See TAXATION.

REVERSAL:

On appeal, see APPEAL AND ERROR, 37-40.

REVIEW:

See APPEAL AND ERROR; EMINENT DOMAIN, 34.

In criminal prosecution, see CRIMINAL LAW, 6, 7.

REVOCACTION:

Of will, see **WILLS**, 2.

RIPARIAN OWNERS:

Right of to damages on diversion of stream, see **EMINENT DOMAIN**, 9.
 Right to damages for diversion of waters of river by state, see **NAVIGABLE WATERS**, 2.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 1, 6-9.

ROADS:

See **HIGHWAYS**.
 Streets in cities, see **MUNICIPAL CORPORATIONS**, 2, 5-7, 10, 14-16, 19, 26, 27.

SAFE PLACE TO WORK:

See **MASTER AND SERVANT**, 6, 7.

SALES:

Subsequent purchasers, see **CHATTEL MORTGAGES**, 2.
 Of corporate stock, see **CORPORATIONS**, 3.
 Of property by Indian, see **INDIANS**, 4, 6.
 Bonus or profit on resale of timber, see **USURY**.
 Of realty, see **VENDOR AND PURCHASER**.

1. **SALES—RESCISSIION—RETURN OF CONSIDERATION—STATU QUO.** Where, upon the sale of a combined harvester and threshing machine, the purchasers were allowed a credit of \$800 for a half interest in machines previously sold, and which machines remained in their possession, they cannot, on rescinding the sale, recover \$800 as though a payment in money had been made; since the vendor is entitled to be placed in *statu quo*, and the vendees' possession of the old machines is a sufficient return of the consideration and satisfies the law. *Holt Manufacturing Co. v. Strachan*..... 380
2. **SALES—BREACH OF WARRANTY—RESCISSIION—DAMAGES.** Purchasers of a combined harvester and threshing machine, upon rescinding the sale, cannot recover damages for loss of crops and expenses incurred in attempting to harvest their crops. *Holt Manufacturing Co. v. Strachan* 380

SEPARATE ESTATE:

Of spouse, see **HUSBAND AND WIFE**.

SERVICE:

Of briefs, see **APPEAL AND ERROR**, 12.
 Of process, see **PROCESS**.
 Of summons in tax foreclosure, see **TAXATION**, 4-7.

SET-OFF AND COUNTERCLAIM:

Right of agent to offset commissions against damages in action for fraud, see **BROKERS**, 3.

SIDE TRACKS:

Compulsory installation, see **RAILROADS**, 1-4.

SIDEWALKS:

Injuries from defects, see **MUNICIPAL CORPORATIONS**, 32-34.

SITUS:

Of property for taxation, see **TAXATION**, 2.

SLANDER:

See **LIBEL AND SLANDER**.

SPECIFIC PERFORMANCE:

1. **SPECIFIC PERFORMANCE—DEFENSES—FALSE REPRESENTATIONS—MATERIALITY—RELIANCE UPON.** Specific performance of a contract for the exchange of property will not be decreed where the contract was induced by plaintiff's false representations that there was nothing but interest due on two mortgages, which did not fall due for two years, when the mortgages were given to secure installment notes for \$1,000 falling due the same year and following years; the same being false representations of material facts peculiarly within the plaintiff's knowledge, and not readily ascertainable by the defendant; especially where plaintiff knew defendant would make no personal investigation. *Chapman v. Hill*..... 475
2. **SAME—RIGHT TO RELIEF—PARTIES—COMMUNITY PROPERTY.** Specific performance of a contract to convey the community property of the defendant will not be decreed where defendant's wife was not a party to either the contract or the action. *Chapman v. Hill*.... 475

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 6, 8-11;
CRIMINAL LAW, 6.

STATES:

Power of eminent domain, see **EMINENT DOMAIN**, 1.
Interstate extradition, see **EXTRADITION**.
Diversion of navigable waters, see **NAVIGABLE WATERS**, 2.

STATUTES:

See **MECHANICS' LIENS**, 2, 3.
Forbidding unreasonable preference in rates, see **CARRIERS**, 3.
Laws impairing obligation of contracts, see **CONSTITUTIONAL LAW**, 2.
Condemnation proceedings, see **EMINENT DOMAIN**, 2.
Condemnation of street railways by city, see **EMINENT DOMAIN**, 6, 7.

STATUTES—CONTINUED.

Requiring compensation "in money" for property taken for public use, see **EMINENT DOMAIN**, 10, 11.

Statute of frauds, see **FRAUDS, STATUTE OF**.

Setting aside homestead for widow and minor children, see **HOME-STEAD**.

Charging offense in language of statute, see **INDICTMENT AND INFORMATION**.

Disqualification of judge, see **JUDGES**.

Public improvements, see **MUNICIPAL CORPORATIONS**, 16.

Recall of elective officers, see **OFFICERS**.

Service of summons in tax foreclosure, see **TAXATION**, 4, 6.

Change of venue for bias of judge, see **VENUE**, 1.

Naming children in will, see **WILLS**, 1.

1. **STATUTES—TITLES AND SUBJECTS—SCOPE.** The title to the act of 1911, Laws 1911, p. 504, submitting a constitutional amendment for the recall of elective officers, is not defective or misleading because broader than the act, in that the title refers to all public officers and to the election of their successors; while the proposed amendment in the body of the act excepts judges and makes no provision for the election of successors; the title being sufficient if it indicates to a person of ordinary intelligence the substance and scope of the act. *Tabor v. Walla Walla*..... 579
2. **SAME—INITIATIVE MEASURES—TIME FOR FILING—POWER OF LEGISLATURE—STATUTES—CONSTRUCTION.** Under the initiative and referendum amendment to the constitution (Laws 1911, pp. 137, 139), providing that petitions shall be filed with the secretary of state not less than four months before the election, and if so filed, the measure shall be submitted to the electors, and declaring that the section is self executing but that legislation may be enacted to facilitate its operation, the legislature has power to fix a reasonable time preceding the election within which a proposed measure shall be filed with the secretary of state, as an act to "facilitate" the initiative and referendum; and the fixing of ten months before the election, leaving but six months within which to complete and file the petitions, is not unreasonable. *State ex rel. Kiehl v. Howell*..... 651
3. **STATUTES—SUBMISSION—INITIATIVE MEASURES—TIME FOR FILING—CONSTRUCTION.** 3 Rem. & Bal. Code, § 4971-1, providing that measures to be submitted upon initiative petition shall be filed within ten months prior to the election, does not require filing ten months prior to the election, but limits the time within which they may be filed to "less than ten months" before election. *State ex rel. Kiehl v. Howell* 651

STAY:

Of ejectment to permit condemnation proceedings, see **EMINENT DOMAIN**, 21, 22.

STOCK:

Corporate stock, see CORPORATIONS, 1-3.

STOCKHOLDERS:

Adverse interest of officers of bank in insolvent corporation, see BANKS AND BANKING, 1.

Of corporations, see CORPORATIONS, 1-3.

STREAMS:

Navigable streams, see NAVIGABLE WATERS, 1.

STREET RAILROADS:

Carriage of passengers, see CARRIERS, 10, 12.

Condemnation of as taking property without due process of law, see CONSTITUTIONAL LAW, 2.

Condemnation of by city, see EMINENT DOMAIN, 6, 7, 10, 11, 14, 15.

Submission to voters of ordinance providing for municipal street railway, see MUNICIPAL CORPORATIONS, 4.

STREETS:

See HIGHWAYS; MUNICIPAL CORPORATIONS, 2, 5-7, 10, 14-16, 19, 26, 27.

SUBMISSION:

Of ordinance to voters, see MUNICIPAL CORPORATIONS, 4.

SUBMISSION OF CONTROVERSY:

1. SUBMISSION OF CONTROVERSY—AGREED CASE—EVIDENCE—ADMISSIBILITY. Upon the submission of an agreed case, under Rem. & Bal. Code, § 378, providing for submission of controversies without action by an agreed case containing the facts, it is error to receive evidence over the objection of the adverse party; since no facts can be considered save as agreed upon in the signed and verified submission. *Leonardo v. Bunnell*..... 495
2. SUBMISSION OF CONTROVERSY—HEARING—JUDGMENT—VACATION. It is not error to set aside a judgment on an agreed case, where it had been entered without any hearing. *Leonardo v. Bunnell*..... 495

SUBROGATION:

Of laborers to right of lien, see MECHANICS' LIENS, 5.

SUBSCRIPTION:

To corporate stock, see CORPORATIONS, 1-2.

SUMMONS:

In foreclosure of tax lien, see TAXATION, 4-7.

SUPPORT:

Setting aside homestead for support of children, see HOMESTEAD.

Of child, see PARENT AND CHILD, 2, 3.

SURETYSHIP:

See PRINCIPAL AND SURETY.

TAXATION:

Of costs on appeal, see Costs.

Payment of taxes as estoppel to assert dedication, see DEDICATION, 3.

Of costs, for mileage of witness, see WITNESSES.

1. **TAXATION—PERSONAL PROPERTY—LIABILITY—DISTRAINT.** Under Rem. & Bal. Code, § 9235, making personal property taxes a lien upon all real and personal property of the owner, and Id., § 9223, providing for distraint for personal property taxes upon all goods and chattels belonging to the person charged, personal property taxes are made the debt of the person assessed, and distraint is not limited to the property assessed. *Porter v. County of Yakima*. . . 299
2. **TAXATION—PERSONAL PROPERTY—CONNECTED WITH A "FARM"—SITUS FOR TAXATION.** Under Rem. & Bal. Code, § 9125, providing that when the owner of live stock connected with a farm does not reside thereon, the stock shall be assessed in the county where the farm is situated, the word "farm" is used in a generic, rather than a restricted sense, and includes a ranch of grazing lands used exclusively for the raising of sheep; thus recognizing the equity of the home county to have the tax. *Porter v. County of Yakima*. 299
3. **TAXATION—VALUATION—RAILROAD RIGHT OF WAY—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY.** An assessment of a strip of land 100 feet wide and 21 miles long, acquired by a railroad company for a right of way, at an assessed valuation of \$1,000 per acre within city limits, and \$500 per acre outside the city, aggregating \$137,980, is so excessive as to be constructively fraudulent, where it appears that the strip was without improvements and undistinguishable from adjacent lands, which in the city were valued at from \$40 to \$300 per acre, and outside the city, at from \$5 to \$165 per acre, which was the fair value; even if single ownership of the continuous strip enhanced its value; especially where the previous year the valuation was only one-fourth as much, and the state tax commission had placed a uniform valuation on rights of way similarly situated of \$1,320 per mile; that a proper assessment would be \$45,993; and no greater valuation should be permitted. *Northern Pac. R. Co. v. Pierce County* 315
4. **TAXATION—FORECLOSURE—SUMMONS—STATUTES—AMENDMENT—WHAT LAW GOVERNS.** Where a service of summons in a tax foreclosure was completed by the last publication on February 13, under Laws 1897, p. 182, § 96, prior to the amendment of 1899, Laws 1899, p. 296, § 13, changing the form of the summons, the validity of the service is to be determined by the earlier act, the amendment having no application. *Noland v. Arnold*. 363

TAXATION—CONTINUED.

5. **SAME—SUMMONS—FOR PUBLICATION—FORM.** A statement at the foot of a published summons below the attorney's names, giving the dates of the first and last publication, is a part of the summons, the same as though it were contained in the body thereof. *Noland v. Arnold* 363
6. **SAME—SUMMONS—FORM—STATUTES.** Under Laws 1897, p. 182, § 96, providing that the summons in a tax foreclosure shall contain a direction to the owner summoning him to appear within sixty days after service of the summons, and *Id.*, § 97, providing that the summons shall be served in the same manner as in civil actions, the form of the summons in tax foreclosures is governed by § 96, *supra*, and not by the general statutes, Rem. & Bal. Code, § 233, requiring summons for publication in civil actions to notify the defendant to appear within 60 days after the first publication of the summons. *Noland v. Arnold* 363
7. **SAME—SUMMONS—FORM.** A summons for publication in a tax foreclosure proceeding, giving the dates of the first and last publication, and notifying the owner to appear within sixty days after the service of the summons upon him, sufficiently notifies him to appear within sixty days after the last publication. *Noland v. Arnold* 363

TELEGRAPHS AND TELEPHONES:

Condemnation of land for right of way, see **EMINENT DOMAIN**, 2.

TENDER:

Of offer to purchase property, see **EMINENT DOMAIN**, 15.

TERMS:

Of contract, agreement upon, see **CONTRACTS**, 1.

TERRITORY:

Annexation of by city, see **MUNICIPAL CORPORATIONS**, 1, 2, 10.

THEFT:

See **LARCENY**.

TIME:

For filing statement of facts, see **APPEAL AND ERROR**, 6.

Extension of for filing statement of facts, see **APPEAL AND ERROR**, 10, 11.

For service of brief, see **APPEAL AND ERROR**, 12.

Promise to move trains on time as question for jury, see **CARRIERS**, 5.

Loss of time as element of damages, see **DAMAGES**, 3, 4.

For challenge to judge, see **JUDGES**.

For publication of ordinance, see **MUNICIPAL CORPORATIONS**, 3.

For filing initiative measures, see **STATUTES**, 2, 3.

For application for change of judges, see **VENUE**, 3.

TITLE:

See QUIETING TITLE.
 Statutes, see STATUTES, 1.
 Of vendor, see VENDOR AND PURCHASER, 1, 3.

TORTS:

See FRAUD; LIBEL AND SLANDER.
 Measure of damages, see DAMAGES, 4-11.
 Maintenance of high power transmission line, see ELECTRICITY.
 Negligent blasting, see EXPLOSIVES.
 Of employers, see MASTER AND SERVANT.
 Liability of master for torts of servant, see MASTER AND SERVANT, 11, 12.
 Agents, see PRINCIPAL AND AGENT, 3.

TRADERS:

In Indian country, see INDIANS, 5.

TRANSCRIPTS:

Of record for purpose of review, see APPEAL AND ERROR, 7-11; CRIMINAL LAW, 6.

TRIAL:

See NEW TRIAL.
 Right to jury trial, see ACTION, 1.
 Exceptions or objections for purpose of review, see APPEAL AND ERROR, 2-4, 11.
 Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 7-11.
 Review of verdicts, see APPEAL AND ERROR, 16-18.
 Of criminal prosecution, see CRIMINAL LAW.
 Instructions as to damages, see DAMAGES, 4, 5.
 Condemnation proceedings, see EMINENT DOMAIN.
 Instructions as to measure of damages for fraud, see FRAUD, 2.
 Instructions in action for injuries sustained through fright of horse from automobile, see HIGHWAYS, 2.
 Instructions in prosecution for larceny of live stock, see LARCENY.
 Instructions in action for injury to servant, see MASTER AND SERVANT, 5.
 Place of trial, see VENUE.

1. TRIAL—FINDINGS OF FACT—SUFFICIENCY. In an action upon a promissory note a finding of fact that the note was executed upon "a valuable consideration," is not objectionable as too general, on a request for specific findings; it not being necessary to set out in the findings what the consideration consisted of. *Barbre v. Hilschman* 563

TRIAL—CONTINUED.

2. **TRIAL—SPECIAL INTERROGATORIES—DISCRETION.** Whether interrogatories or special findings shall be submitted to a jury is a matter entirely within the discretion of the trial court. *Loy v. Northern Pac. R. Co.*..... 25
3. **TRIAL—INSTRUCTIONS—CONFUSING INSTRUCTIONS.** Instructions are so confusing and misleading as to require a reversal, where the jury were told that a certain fact does “not” prevent recovery, the instruction was then reread, leaving out the word not, giving a contrary meaning, the instructions were read to the jury as the law, and part of them denied, followed by a colloquy with counsel as to whether they correctly stated the law and this course followed throughout, from which the jury could get no clear idea; especially where other instructions gave contradictory rules. *Reville Fish Products Co. v. American-Hawaiian Steamship Co.*..... 49
4. **TRIAL—INSTRUCTIONS—MEASURE OF DAMAGES—LIMIT—ISSUES AND PROOF.** It is prejudicial error to fail in the instructions to limit the recovery to the amount alleged, and to authorize recovery of an item of damages as to which there was no evidence, notwithstanding the amount awarded was less than the amount claimed; since the effect on the verdict cannot be determined. *Orandall v. Puget Sound Traction, Light & Power Co.*..... 37

UNITED STATES:

Proceedings after remand from United States Supreme Court, see
APPEAL AND ERROR, 39.

“General” acts of Congress, see CONGRESS.

Indian lands, see INDIANS.

UNLAWFUL DETAINER:

See LANDLORD AND TENANT, 1, 2.

USURY:

1. **USURY—WHAT CONSTITUTES.** The payment of a fee of five dollars, to an agent negotiating a loan to take up a prior note and chattel mortgage, does not make the loan usurious, under Rem. & Bal. Code, § 6251, where the fee was paid for the agent's services in making an examination of the property and county records, preparing and securing acknowledgment of the new mortgage and filing a release of the prior mortgage, and the court found that the fee was a reasonable charge for the services and not a commission for making the loan. *Testera v. Richardson*..... 377
2. **USURY—ACTIONS—EVIDENCE—SUFFICIENCY—BONUS OR PROFITS ON RESALE.** Under the rule that the burden of proving the defense of usury is upon the party alleging it and that it is necessary to establish an unlawful intent, the defense of usury, in an action to fore-

USURY—CONTINUED.

close a mortgage for \$25,000, is not established where it appears that the defendant was desirous of purchasing certain timber at \$105,000, the owner's selling price, but was unable to raise any money, when it interested the plaintiff's president in the matter, who secured the loan of \$25,000 from the plaintiff to enable the defendant to handle the matter under an agreement that he would purchase the timber and resell it to the defendant at an advance of \$20,000, represented by four notes for \$5,000 each, which were to be paid without interest as the timber was cut, and which sum was conceded to him as his profit in the transaction, although, in consummating the deal, the deed to the timber was made direct to the defendants in order that deferred payments on the purchase price would not appear as liabilities of the plaintiff or its president; the testimony as to the final consummation of the deal indicating that the notes were intended as a profit on the resale and not as a commission or bonus for securing the \$25,000 loan. *Washington Fire Insurance Co. v. Maple Valley Lumber Co.*..... 686

VACATION:

See JUDGMENT.

Decree of divorce, see DIVORCE, 2.

Of judgment entered without hearing, see SUBMISSION OF CONTROVERSY, 2.

VALUE:

Evidence to show value, see EVIDENCE, 1, 4.

Excessive valuation of property, see TAXATION, 3.

VARIANCE:

Between pleading and proof in civil action, see PLEADING, 2.

VENDOR AND PURCHASER:

Assignment of contract for purchase of land, see ASSIGNMENTS.

Fraud of agent in sale or purchase of land, see BROKERS.

Fraud of grantee in procuring deed, see CANCELLATION OF INSTRUMENTS.

Fraud in exchange of property, see FRAUD, 1.

Purchasers of property fraudulently conveyed, see FRAUDULENT CONVEYANCES.

Transfer of ownership of personal property, see SALES.

Specific performance of contract, see SPECIFIC PERFORMANCE.

1. **VENDOR AND PURCHASER—REMEDIES OF VENDEE—RESCISSION—DEFECTS IN TITLE—DISCRETION—LACHES.** It is not an abuse of discretion to refuse a rescission of a contract, asked on the ground of partial failure of defendant's title, where defendant acted in good faith and upon notice of the defect set about to perfect the title, which was done before judgment, and where plaintiffs did not

VENDOR AND PURCHASER—CONTINUED.

- promptly rescind on notice of the defect, but thereafter made valuable improvements, for which recovery was sought; since rescission is not a matter of right, and is defeated by laches. *Wetternach v. Jones-Thompson Investment Co.*..... 144
2. VENDOR AND PURCHASER—RESCISSION BY VENDOR—FORFEITURE—SECURITY FOR FULL PERFORMANCE. Upon rescission by the vendor for default in the payment of interest due on a land contract, the vendor cannot retain a land contract assigned as security for full performance of the vendee's contract of purchase. *Miller v. Moulton*.... 325
3. VENDOR AND PURCHASER—CONTRACT—PERFORMANCE OR BREACH—TITLE. Where laborers were to be paid for clearing in part by conveyance of lots, they cannot, before completion of the contract and earning their deeds, quit and claim the full compensation in cash, because of defects in title to the lots; since the vendor may be able to convey title when the time for performance arrives. *Zisich v. Holman Security Investment Co.*..... 392
4. SAME—REMEDIES OF VENDOR—LIQUIDATED DAMAGES OR PENALTY—CONTRACT—CONSTRUCTION. An assignment of a land contract as part consideration and security for the performance of a contract to purchase land, cannot be retained as liquidated damages as provided in the contract of sale on declaring a forfeiture, where the vendee was required to do many things, such as keeping up the premises and orchard, paying taxes, etc.; since the stipulated sum was to be paid for the nonperformance of several acts of different degrees of importance, making it a penalty; and since the stipulations determining whether it was to be treated as a penalty or liquidated damages are uncertain and ambiguous. *Miller v. Moulton*..... 325
5. VENDOR AND PURCHASER—REMEDIES OF VENDEE—FRAUD—MISREPRESENTATIONS—RELIANCE. The purchaser of real property has the right to rely on representations, made in answer to a direct inquiry, as to what trade fixtures were appurtenant to and passed with the land, where there was nothing in their appearance that negatived the idea that they were part of the realty. *O'Daniel v. Streeby*.... 414

VENUE:

1. VENUE—CHANGE—BIAS OF JUDGE—CONTEMPT—"PROCEEDING"—STATUTES—CONSTRUCTION. A prosecution upon information for constructive contempt, committed out of the presence of the court, is a "proceeding" within 3 Rem. & Bal. Code, §§ 209-1, 209-2, providing that no superior court judge shall sit to hear or try any action or proceeding when it is established that he is prejudiced against any party or attorney. *State ex rel. Russell v. Superior Court*..... 631
2. SAME—RIGHT TO CHANGE. Upon an application for a change of judges, seasonably made under 3 Rem. & Bal. Code, § 209-1, a party is entitled to the change as a matter of right. *State ex rel. Russell v. Superior Court* 631

VENUE—CONTINUED.

3. **VENUE—CHANGE—BIAS OF JUDGE—TIME FOR APPLICATION.** In an action for an injunction, an application for a change of judges, under 3 Rem. & Bal. Code, § 209-1, is too late, when not made until after a hearing upon a show cause order and the granting of a temporary injunction upon such hearing. *Fortson Shingle Co. v. Skogland*.. 8

VERDICT:

- Review on appeal, see **APPEAL AND ERROR**, 16-18; **CRIMINAL LAW**, 7.
- Inadequate or excessive damages, see **CARRIERS**, 13; **DAMAGES**, 6-11.
- Review of, see **EMINENT DOMAIN**, 34.
- Ground for new trial, see **NEW TRIAL**, 2, 3.

VESTED RIGHTS:

- Equal protection of laws, see **CONSTITUTIONAL LAW**, 2.

VIEW:

- Of premises by jury, see **EMINENT DOMAIN**, 20.

WAGES:

- Minimum wage for public work, see **MUNICIPAL CORPORATIONS**, 11-13, 26, 27.

WAIVER:

- Error waived in appellate court, see **APPEAL AND ERROR**, 3, 7.
- Breach of contract, see **CONTRACTS**, 5.

WARRANTS:

- For extradition of accused, see **EXTRADITION**.

WARRANTY:

- Breach of, see **SALES**.

WATERS AND WATER COURSES:

- See **NAVIGABLE WATERS**.
- As boundaries, see **BOUNDARIES**.
- Condemnation for waterway district, see **EMINENT DOMAIN**, 5, 9, 18, 19, 23-26.
- Condemnation by city for water system, see **EMINENT DOMAIN**, 12, 13, 16.
- Damages to tenant from broken water pipes, see **LANDLORD AND TENANT**, 5.

WILLS:

- Oral contract to make will, see **FRAUDS**, **STATUTE OF**, 3, 4.

1. **WILLS—REQUISITES—PRETERMITTED CHILDREN — NAMING CHILDREN AS A CLASS—STATUTES—CONSTRUCTION.** A will devising all the testator's estate to his wife and declaring that he makes no provision for "my children" or "any child which may be hereafter born" for

WILLS—CONTINUED.

the reason that their mother will deal justly with them, sufficiently "names" the children to prevent intestacy as to them, under Rem. and Bal. Code, § 1326, providing that a testator shall be deemed to have died intestate as to any child or children not named or provided for in his will; since the purpose of the statute is merely to prevent pretermission, and it is sufficiently complied with by naming them as a class, when coupled with words showing that the class included not only children *in esse*, but children thereafter to be born. *Gehlen v. Gehlen* 17

2. **WILLS—REVOCATION.** A will executed in pursuance of an oral contract to leave property to another, void under the statute of frauds, is effectually revoked by the making of a subsequent will without notice to the beneficiary. *McClanahan v. McClanahan* 138

WITNESSES:

Experts, see EVIDENCE, 3, 4.

1. **WITNESSES—FEES—MILEAGE.** Costs may be taxed for the mileage of a witness coming to attend the trial from Oregon, where his business was located, although his home was in Seattle. *Wohlforth v. Kuppler* 339

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

Minimum wage for public work, see MUNICIPAL CORPORATIONS, 11-13, 26, 27.

WRITS:

See HABEAS CORPUS; PROCESS.

